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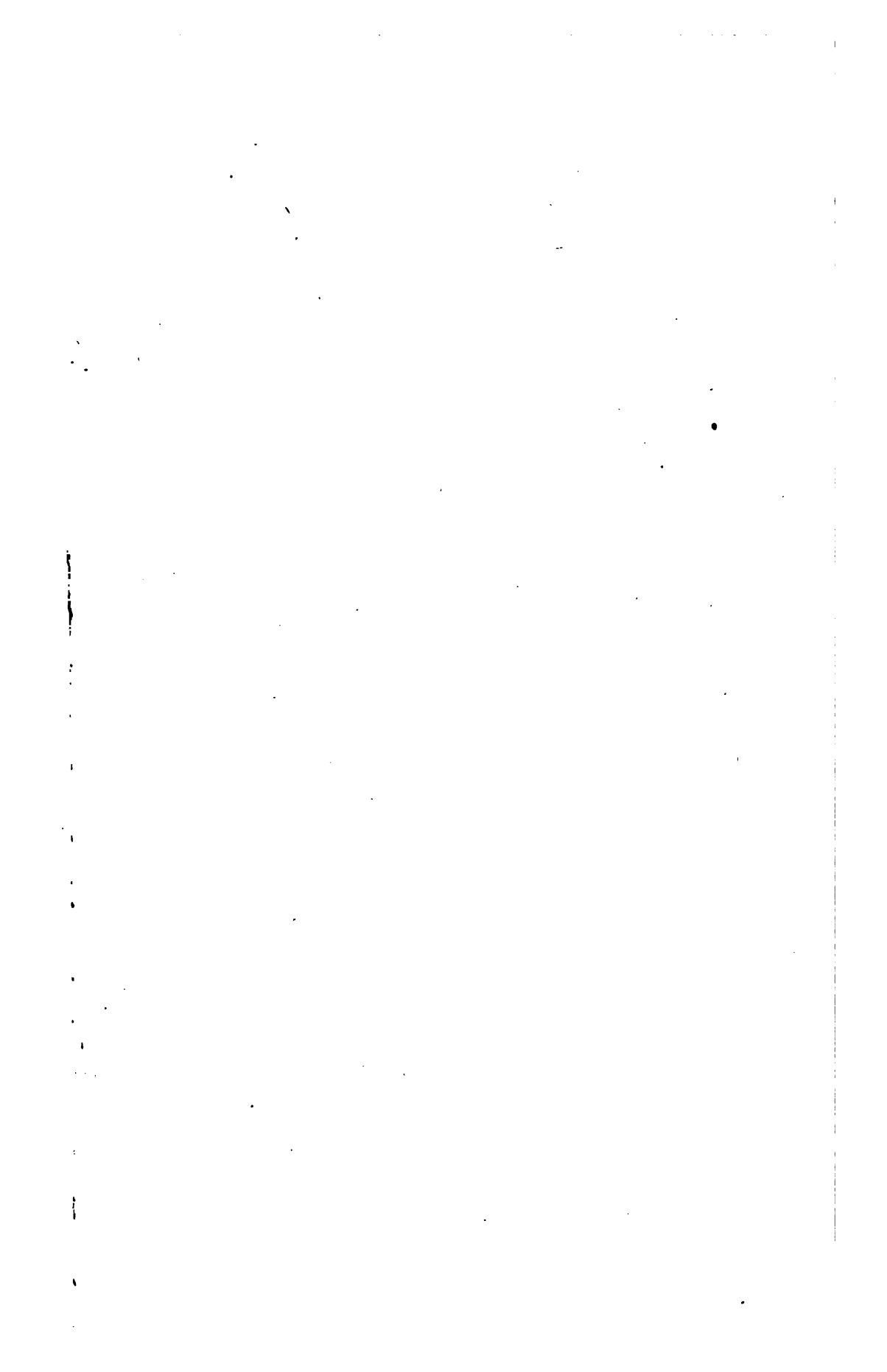
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BENJAMIN'S
SALE OF PERSONAL PROPERTY.

VOLUME ONE.

BENJAMIN'S
=

Treatise on the Law

OF

SALE OF PERSONAL PROPERTY

WITH REFERENCES TO THE

AMERICAN DECISIONS.

THIRD ENGLISH EDITION.

WITH THE AUTHOR'S SANCTION AND REVISION.

BY

ARTHUR BEILBY PEARSON, B. A., and HUGH FENWICK BOYD,
OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

FOURTH AMERICAN EDITION.

BY

CHARLES L. CORBIN,
COUNSELOR-AT-LAW.

IN TWO VOLUMES.

VOL. I.

JERSEY CITY:
FREDERICK D. LINN & CO.

1884.

Copyright, 1883, by F. D. LINN & CO.

TO THE
HONORABLE DAVID A. DEPUE

Justice of the Supreme Court of New Jersey,

THE AMERICAN NOTES TO THIS WORK ARE RESPECTFULLY DEDICATED, AS AN EXPRESSION OF ADMIRATION FOR HIS
PROFOUND RESEARCH, EXTENSIVE LEARNING
AND ACCURATE DISCRIMINATION
AS A JURIST.

THE AMERICAN EDITOR.

A CARD.

The English publisher of "Benjamin on Sales" recommends to the American bar the fourth American edition, published by F. D. Linn & Co., of Jersey City. This edition is published from advance sheets of the third English edition, purchased from me, and is the only edition printed or to be printed in the United States from the English advance sheets or with authority from me.

HENRY SWEET.

3 CHANCERY LANE, LONDON,
April 6th, 1883

AMERICAN EDITOR'S PREFACE.

The American decisions on the law of sales are very numerous, and no attempt has been made by the American editor to cite them all. Preference has been given in making a selection to the decisions of the United States Supreme Court and to the recent decisions of the state courts and of the courts in Ontario Province. More than two-thirds of the cases cited were decided within the last fifteen years. The law of sales embodied in these cases differs in many important particulars from the law as established by the older authorities. In many of them the work of Mr. Benjamin, first published in 1868, is cited, and there can be no doubt that it has contributed greatly to harmonize conflicting views.

The law of sales is chiefly common law, and has been little varied by legislation in the United States. English decisions on this subject are, therefore, of special value to us and are daily cited in our courts. Mr. Benjamin's treatise collects the most authoritative English cases, states them with clearness and classifies them with accuracy. In this accuracy of classification consists a striking merit of the work, the subject being one that requires careful discrimination to avoid confusion.

The American decisions usually lend themselves readily to our author's division of his subject, and on most points accord with the text. Some important differences exist. These arise from a preference often given to ancient English authorities over modern decisions over-ruling them, from the more liberal remedies afforded by the American courts, and in some few instances, from a deliberate refusal to follow English precedents, because not adapted to our institutions or circumstances. The following is a statement of the most important of these differences:

1. Markets overt do not exist in the United States, and therefore no title can be acquired by purchase of any stolen property except negotiable securities. See p. 15.

2. As to the competency of married women to contract, the American cases follow the older and reject the later English authorities, and hold that desertion of a wife by her husband removes her disability. See p. 44. But the statutes in both countries have so far removed the disabilities of married women that this difference has become unimportant. See p. 48, *et seq.*

3. Whether the section of the statute of frauds relative to executory contracts for the sale of goods, applies to a case where goods are manufactured or a chattel is made to order for the purchaser, is a question which our author regards as settled in England, after much controversy, in the affirmative, by the case of *Lee v. Griffin*, 1 B. & S. 272. Our courts for the most part have refused to follow *Lee v. Griffin*, though it has been recognized in several states and in Ontario Province. See pp. 125-127.

4. In England an executory contract for the sale of growing timber or other natural products of the soil to be severed, is regarded as a sale of goods under the statute of frauds, and this view is taken in Massachusetts and several other states. See p. 136. But American authorities for the most part support the proposition that such a sale is a sale of an interest in land within the meaning of the statute. See p. 139.

5. In general, on an unconditional sale of specific personal property, the title passes by force of the contract, without delivery or payment, the seller having merely a lien for the price while the goods continue in his possession. The American decisions recognize, in addition to this lien, the right of the seller to rescind the sale on default of payment by the buyer. See p. 339.

6. The rule called "Lord Blackburn's second rule," stated on page 359, that where goods are to be weighed or measured to ascertain the price, the property does not pass until the price has been thus ascer-

tained, has been so little regarded in America that it can hardly be called a rule here. See pp. 378, 390.

7. There is a class of contracts, very common in this country, where the possession of a chattel sold, or contracted to be sold, on credit, is given to the buyer, under an agreement that the ownership shall remain in the seller until the price is paid. It is universally held that such an agreement is valid between the parties. But where the party thus in possession sells to a *bona fide* purchaser for value, without notice, in many of the states it is held that such purchaser obtains title. This is the view taken in the United States Supreme Court, where contracts of sale, accompanied by delivery, but reserving title to secure the price, are regarded as chattel mortgages, and void unless recorded as such under the chattel mortgage acts. Many American courts, however, still enforce the law of England, that one in possession, under such a conditional sale, having no title, can confer none. See pp. 405-421.

8. That the property in goods cannot pass until they are identified and set apart from the bulk of which they form part, our author says is clear. See p. 323. But the American decisions hold that where the property sold is part of a specific mass of *uniform character and quality*, title will pass in the portion sold though not separated from the bulk. See pp. 428-440.

9. In England, when a chattel is made to order, the property does not, in general, pass to the purchaser until acceptance by him. See pp. 461-463. The recent American decisions seem to warrant the statement that the seller may, on the due completion of a chattel ordered, consider it as the property of the buyer, and maintain a suit for the price, even though the buyer has refused to accept it. See pp. 463, 476-478, 980, 981.

10. In Massachusetts and some other states, the courts have adopted an opinion formerly held, but now overruled in England, that the buyer of a warranted chattel may avoid the contract of sale for breach of the warranty. In most of the states, however, the modern English doctrine has been preferred. See pp. 546-551.

11. It was formerly held in nearly all the states, and in the United States Supreme Court, that where one who bought goods permitted them to remain in the seller's possession, the transaction was a fraud in law as to the creditors of, and purchasers from, the seller. This opinion was based on public policy and on the authority of the case of *Edwards v. Harben*, 2 T. R. 587. In most of the states the law is now held to be as in England, that the retention of possession is presumptive evidence of fraud, but that the presumption may be rebutted by proof of good faith, and that the question is one of fact and not of law. Many courts of high authority, however, hold to the old rule. See pp. 641-647.

12. Our author says, on page 787: "In America the law seems to be fairly settled in accordance with the decision in *Simpson v. Crippen*, viz., that in the absence of any expressed intention of the parties, a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one installment does not entitle the other party to refuse delivery or acceptance of the installments that remain." And our author applies this to cases where the consideration is entire, and not severable. From this view of the law in America, as to the effect of a default in the delivery or acceptance of an installment, this editor dissents, although not very confidently. The subject will be found discussed in the note, pp. 787-790.

13. In England a warranty of title is implied in all sales of personal property. It is generally laid down in American text-books that no warranty of title is implied on a sale of personal property not in the seller's possession at the time of sale. Few recent decisions will be found upholding this proposition, and it is not improbable that the recent English decisions on this subject will be followed in our courts. See pp. 840, 841.

14. Our author insists that where a chattel is sold by description, and the article sold does not answer the description, the case is not to be regarded as one of breach of warranty, but of breach of a condition precedent. Therefore the buyer cannot accept property not answering the description and recover damages, but must reject the chattel. See

pp. 799, 844. But the American decisions place sales by description on the same footing as sales by sample, and without denying the remedy of rejection of goods not answering the description, afford additional remedies by treating words of description as words of warranty. See p. 799, note 32, (language of Depue, J.,) and p. 844, note 24.

15. Where one who has contracted to deliver goods under an entire contract of sale, makes a partial delivery, and fails as to the residue, the question arises whether he has any remedy. Our author says that the buyer may refuse a delivery of part; but if he accepts part, he must pay for it or return it, after the time for delivery of the whole has expired. See p. 901. But in New York, the decisions hold that the seller can recover nothing for partial delivery, unless the buyer has waived complete delivery, and such waiver is not inferred from the mere receipt and consumption of the goods by the buyer, pursuant to the contract. This harsh rule has been followed in several other states. But the modern American rule, sustained by strong authority, permits the seller who has made a partial delivery, to recover its value, deducting therefrom damages for breach of his contract to deliver the residue; and this remedy he has, even though his default was willful. See pp. 901-903.

16. In England, payment of the price of goods by bill of exchange, note, or other negotiable security, is presumptively conditional, and the right to the price revives on the non-payment of the security. This is the law in most of the states, and in the Supreme Court of the United States. See pp. 938-942. But in Maine, Vermont, Massachusetts, and Indiana, such payment is presumptively an absolute satisfaction of the debt. The English editors erroneously suppose the same rule to prevail in Illinois, Wisconsin, and other states. See pp. 965, 966.

17. Our author elaborately reviews the English decisions as to the seller's remedy of resale in cases where the buyer has failed to accept, and pay for the goods sold or contracted for. This remedy seems never to have been fully settled and defined in England, and it would appear, from recent decisions, that the courts there do not recognize

any such right unless reserved to the seller by agreement, although the buyer being in default cannot maintain trover against the seller because of such resale. In the United States the seller's remedy by resale on the buyer's failure to accept and pay, is generally recognized, and the principles which govern its exercise are well settled. See pp. 1013, 1019-1023.

It is believed that the foregoing summary includes most of the topics under the law of sale, on which the American and the English courts disagree; and it will be observed that there is high American authority to be found in accord with the English decisions on many of these points. On the whole, considering the wide range of the subject, the differences are remarkably few.

The work of the American editor will be found in the notes distinguished by numbers, the English notes being designated by letters. Besides these notes, the American editor has introduced into the text an addition to each of Chapters II., III., IV., V., and VI., Book II., stating the American law on the subjects considered in those chapters, the questions there discussed having given rise to much recent litigation in this country. An addition has also been made to Chapter I., Book III., treating of Avoidance for Breach of Warranty, a right not recognized in England.

Mr. Benjamin has not divided his work into numbered paragraphs. These have been added by the American editor for convenience of cross-reference. The index and table of contents refer to the pages.

NEW YORK, April, 1883.

CHARLES L. CORBIN.

PREFACE TO THE THIRD EDITION.

In presenting a new edition of "Benjamin on Sales," the editors must crave a full measure of indulgence, by reason of the difficulties with which they have had to contend through the enforced retirement of the learned author from the profession. It was Mr. Benjamin's intention to have revised the work throughout as it passed through the press, and he had accordingly revised and approved the editors' labors up to the end of the chapter on Delivery (p. 913,) when his health gave way, and he was interdicted by his physicians from any further work, and ordered absolute repose and cessation from all intellectual fatigue. Under these circumstances the editors are compelled to issue the work as completed by themselves.

In accordance with the author's desire, the text of the last edition has been retained, and all fresh matter, other than that inserted in the notes, is included in brackets. This course, whilst entailing the retention of some portions of the work,—particularly in the chapter on Parties,—the subject matter of which has been rendered obsolete by later decisions and statutes, is in the opinion of the editors justified, by reason of the high value which has attached to the text of the treatise. It must also be remembered that the learned author had not at his disposal the leisure time necessary for re-casting the work.

The passing of the Bills of Sale Acts, 1878 and 1882, and the numerous decisions following upon the earlier statute, made it necessary to re-write the portion of the work dealing with the subject of Bills of Sale.

Owing to the unavoidable delay attending publication, it was impossible to consider in the text the effect of the Married Women's

Property Act of 1882. It has, therefore, been set out, so far as material, with a few observations, in the supplementary pages at the end of the chapter on Parties.

The more important decisions of the Supreme Court of the United States, and of the Court of Appeals in the State of New York, together with some decisions of the other states on the subject of the book, have been noticed.

The index, in the compilation of which the editors are indebted for assistance to their friend Mr. F. J. Frankau, barrister-at-law, has been very much enlarged, and will, it is thought, be found complete.

In conclusion, the editors express the earnest hope that their work may not have impaired the high reputation which "Benjamin on Sales" has won in America, as well as in this country.

TEMPLE, February, 1883.

A. B. P.

H. F. B.

PREFACE TO THE SECOND EDITION.

In this second edition, the numerous important decisions which have been given since the publication of this treatise in 1868, have been carefully noted, and some anterior authorities which had escaped the author's research have been added.

The favorable reception given to the work in the United States has encouraged the insertion of a larger number of American decisions; but in order to avoid an unnecessary increase in the bulk of the volume, reference has generally been confined to the latest leading case in the Reports of the Supreme Court of the United States, and of the Court of Appeals in the State of New York. This will suffice to guide the reader to the authorities in the courts of the other states.

TEMPLE, July, 1873.

PREFACE TO THE FIRST EDITION.

If the well-known treatise of Mr. Justice Blackburn had been designed by its learned author to embrace the whole law on the subject of sale of goods, nothing further would now be needed by the practitioner than a new edition of that admirable work, incorporating the later statutes and decisions, so as to afford a connected view of the modifications necessarily introduced by lapse of time into the law of a contract so perpetually recurring as that of sale. But unfortunately for the profession, Blackburn on Sale was intentionally restricted in its scope, and is confined to an examination of the effect of the contract only, and of the legal rights of property and possession in goods.

This treatise is an attempt to develop the principles applicable to all branches of the subject, while following Blackburn on Sale as a model for guidance in the treatment of such topics as are embraced in that work. An effort has been made to afford some compensation for the imperfections of the attempt, by references to American decisions, and to the authorities in the civil law, not elsewhere so readily accessible.

TEMPLE, August, 1868.

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ADDENDA ET CORRIGENDA.

Page 42, note (i), add "but see *In re Weaver*, 21 Ch. D. 615, C. A."

" 63, note (b), after "post p." add "83."

" 64, note (h) after "post p." add "68."

" 98, on *Belding v. Reed*, add reference to *Lazarus v. Andrade*, 5 C. P. D. 818, and *Re D'Epineuil*, 20 Ch. D. 758.

" 253, 2d line from foot of page, after words "in its nature and effects is," add "in some respects;" and see *Cassaboglou v. Gibb*, 9 Q. B. D. 220, (under appeal.)

" 459, note (d), add "the last case on this subject is *Stock v. Inglis*, 9 Q. B. D. 708, 717."

" 563, note (h)—*Heaven v. Pender* is now under appeal, (see, also, p. 565.)

" 597, note 33, for "§ 738" read "§ 638."

" 648, at close of note 61, for "ante note 6" read "ante note 60."

" 674, note (f), add "and an unregistered bill of sale, executed before the act of 1882 came into operation, is not void as between the parties. *Hickson v. Darlow*, 81 W. R. 361."

" 746, note 7, for "neuninem" read "neminem," and for "sen" read "seu."

" 784, note (h)—The remarks of *Bowen, L. J.*, are now reported in 9 Q. B. D., at p. 671.

" 786, note (c)—The *Mersey Steel and Iron Co. v. Naylor* is now reported in 9 Q. B. D. 648, C. A.

SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

AT COMMON LAW.

CHAPTER I.

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§ 1. By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*. (a)¹ Hence it follows, that to consti-

(a) Blackstone's definition is, "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another for a valuable consideration." Kent 468, (12th ed.) This definition would include barter, which, though in-

1. Definition of Sale.—The term "sale" as used in a statute, was defined by the United States Supreme Court in the case of *Williamson v. Berry*, 8 How. 544, as follows: "We remark that 'sale' is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and to

tute a valid sale, there must be a concurrence of the following elements, viz.: (1st) Parties competent to contract; (2d) Mutual assent; (3d) A thing, the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in money paid or promised. That it requires (1st) parties competent to contract, and (2d) mutual assent, in order to effect a sale, is manifest from the general principles which govern all contracts. The third essential is that there should be a transfer of the *absolute or general* property in the thing sold; for in law, a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing. An illustration of this is presented in the case of *Jenkins v. Brown*, (b) where a factor in New Orleans bought a cargo of corn with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own order, and endorsed and delivered them to a banker

most respects analogous, is certainly not identical, with sale. Whether the contracts of barter (*permutatio*) and sale (*emptio-venditio*) were essentially different, was for a long time a moot point with the two rival schools of Roman jurists. Gaius, professing to be a Sabinian, maintained, from the purely historical point of view, that there was no distinction, barter being only the most ancient form of the contract of sale. Justinian, however, adopted and promulgated the opin-

ion of the school of Proculus, that price was of the essence of the contract of sale; and barter was relegated to the class of real contracts. *Vide* Gaius, lib. iii., 140; Inst., lib. iii., c. 23; D., lib. xviii., c. 3. The dispute was one of some practical importance, owing to the consequences which flowed from the distinction in the Roman law between real and consensual contracts.

(b) 14 Q. B. 496; 19 L. J., Q. B. 286.

pass rights of property for money, which the buyer pays, or promises to pay, to the seller for the thing bought and sold." This definition was approved in *Huthmacher v. Harris*, 38 Penna. 498; *Mackanness v. Long*, 85 Penna. 158, 163; and *Edwards v. Cottrell*, 43 Iowa 194, 204. The definition in the text was cited in *Wittowsky v. Wasson*, 71 N. C. 451. See *De Fouclear v. Shottenkirk*, 3 Johns. 170; *Gardner v. Lane*, 12 Allen 39. In

Patten v. Smith, 5 Conn. 196, 199, *Hosmer, C. J.*, said: "The sale of goods and chattels is a transmutation of property from one to another, accompanied, whenever it is practicable, with a delivery of the articles to the purchaser." This limitation, as to delivery, is against the weight of authority, except where the contract of sale provides for delivery by the vendor. See *infra*, §§ 315, 325, *et seq.*

to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

And in like manner when goods are delivered in pawn or pledge, the general property remains in the pawnor, and a special property is transferred to the pawnee. (c) ²

§ 2. So in relation to the element of price. It must be *money*, paid or promised, accordingly as the agreement may be for a cash or a credit sale; ^{Price—must be money.} ³ but if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter. ⁴ So also goods may be given in consideration of work and labor done, or for rent, or for board and lodging, (d) or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties are generally, but not always, the same as in the case of sales. (e) If no valuable consideration be given for the transfer, it is a gift, (f) not a sale. ⁵

(c) *Halliday v. Holgate*, L. R., 3 Ex. 299; *Harper v. Goodsell*, L. R., 5 Q. B. 424.

2. *Property in a Pledge.*—*Gibson v. Boyd*, 1 Kerr (N. B.) 150; *Jarvis v. Rogers*, 15 Mass. 389. "Where property is pledged, the pledgee acquires a special property in the goods, and we are aware of no reason or principle that would prevent a transfer, nor can we perceive any reason why the mere transfer of the pledged property should destroy the original lien." *Craig, J., Belden v. Perkins*, 78 Ill. 449, 451; *Talty v. Freedmen's Savings Co.*, 3 Otto 321. In like manner the pawnor can sell his interest, subject to the rights of pawnee. *Jack v. Eagles*, 2 Allen (N. B.) 95; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540; *Carrington v. Ward*, 71 N. Y. 360.

3. It is not necessary that the price should be fixed to constitute a sale, provided the property is delivered. The law in such case implies a promise to pay the value. "A delivery in consideration of being paid the value is a sale." *Hill v. Hill*, 1 N. J. L. (Coxe) 261. See § 85, *infra*.

4. See note 4, p. 5.

(d) See an example in *Keys v. Harwood*, 2 C. B. 905.

(e) For cases showing distinction between sale and barter, see *Harris v. Fowle*, cited in *Barbe v. Parker*, 1 H. Bl. 237; *Hands v. Burton*, 9 East 349; *Harrison v. Luke*, 14 M. & W. 139; *Sheldon v. Cox*, 3 B. & C. 420; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Forsyth v. Jervis*, 1 Stark. 437; *Read v. Hutchinson*, 3 Camp. 352.

(f) Parol gifts of personal chattels do

5. See note 5, p. 5.

In *Ex parte White*, *In re Neville*, (g) is an interesting exposition, by James and Mellish, L. JJ., of the principles by which to distinguish between a contract of "sale or return" and a contract of *del credere* agency; and in the *South Australian Insurance Company v. Randell*, (h) the distinction between a sale and a bailment is elucidated. ⁶

§ 3. By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law "a bargain and sale of goods;" but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, then the contract was called in the common law an executory agreement. The distinction between a bargain and sale of goods and an executory agreement is the subject of Book II. of this Treatise.

§ 4. A very important modification of the common law in respect to a bargain and sale of goods, and to an executory contract, was introduced by the statute 29 Car. II., c. 3, commonly called the Statute of Frauds, and an amendment thereof, the

not pass the property, if there be no actual delivery to the donee. *Irons v. Smallpiece*, 2 B. & A. 551; *Shower v. Pilch*, 4 Ex. 478; *Douglas v. Douglas*, 22 L. T. (N. S.) 127; *Power v. Cook*, 4 Ir. R. C. L. 247. As to gifts of money by cheque, see *Bromley v. Brunton*, 6 Eq. 275, and cases there cited: *Jones v. Lock*, 1 Ch. 25; *In re Beak's Estate*, 13 Eq. 489; *Rolls v. Pearce*, 5 Ch. D. 730. And as to gift of a bond without delivery, see *Morgan v. Malleson*, 10 Eq. 475, and cases there cited. In *Morgan v. Malleson*, the Court treated a gift, which was imperfect by reason of non-delivery, as an effectual

declaration of trust; but this decision, although approved by Malins, V.-C., in *Baddeley v. Baddeley*, 9 Ch. D. 113, is opposed to the current of recent authorities. *Warriner v. Rogers*, 16 Eq. 340; *Richards v. Delbridge*, 18 Eq. 11; *Moore v. Moore*, Id. 474; *Heartley v. Nicholson*, 19 Eq. 233; *In re Breton's Estate*, 17 Ch. D. 416.

(g) 6 Ch. 397; S. C. in H. L., 21 W. R. 465; and see *Ex parte Bright*, *In re Smith*, 10 Ch. D. 566, C. A.

(h) L. R., 3 P. C. C. 101.

6. See note 6, p. 6.

9 Geo. IV., c. 14, § 7, known as "Lord Tenterden's Act," which are very fully considered, *post*, Book I., Part 2.

4. **Sale or Barter.**—The chief practical importance of the difference between barter and sale, lies in the different form of pleading required in case of breach. In an action for breach of an agreement to exchange, the declaration must contain a special count on the agreement. The common counts will not suffice. An averment of sale will not be sustained by proof of an exchange. *Vail v. Strong*, 10 Vt. 457; *Weart v. Hoagland*, 2 Zab. 517; *Mitchell v. Gile*, 12 N. H. 390. But if the contract is to pay an agreed price for goods received in specific articles of which the quantity is not fixed, the contract is a sale, and suit will lie for the price if the articles are not delivered, and will not lie for breach of agreement to deliver the articles. *Weiss v. Mauch Chunk Iron Co.*, 58 Penna. 295, 301; *White v. Tompkins*, 52 Penna. 363; *Herrick v. Carter*, 56 Barb. 41; *Butcher v. Carlile*, 12 Gratt. 521; *Crockett v. Moore*, 3 Sneed (Tenn.) 145; *Picard v. McCormick*, 11 Mich. 68, 77. An agreed price indicates a sale, not being essential to a barter. *Loomis v. Wainwright*, 21 Vt. 520. But, of course, the fact that a price was fixed is not conclusive, and where a fixed price for goods delivered is to be paid in a fixed quantity of some other goods, or in some other goods at a certain price per yard, pound or bushel, the transaction is an exchange and must be sued on as such. *Butcher v. Carlile*, 12 Gratt. 520, 522; *Beirne v. Dunlap*, 8 Leigh 514. One on whom the owner confers authority to sell property obtains no authority to barter it. "A mortgage of a chattel with power of sale confers no right to exchange the mortgaged property for other property." *Edwards v. Cottrell*, 43 Iowa 194, 204.

5. **Gifts.**—Actual delivery and acceptance are necessary to pass title by gift. *Mahan v. United States*, 16 Wall. 143; *Grover v. Grover*, 24 Pick. 261; *Young v. Young*, 80 N. Y. 422, 430. The law presumes acceptance of a beneficial gift, so that a gift to an infant or lunatic is valid. *Rinker v. Rinker*, 20 Ind. 185; *De Levillain v. Evans*, 39 Cal. 120. The mere promise to make a gift, though in writing, is void. A gift of the giver's own note does not bind him to pay it, for want of consideration, unless it is purchased by some third person *bona fide*. *Phelps v. Pond*, 23 N. Y. 69, 78; *Walsh v. Kennedy*, 9 Phil. 178; *Starr v. Starr*, 9 Ohio St. 74. Even money or property delivered to an attorney or trustee for the benefit of a third person, or for a charitable purpose, may be reclaimed before it reaches the beneficiary. 2 Kent Com. 439; *People v. Johnson*, 14 Ill. 342; *Picot v. Sanderson*, 1 Dev. (N. C.) 309. But when the trustee has changed his character and become, with the assent of the donor, agent or trustee for the donee, the gift is beyond recall. *Blanchard v. Sheldon*, 43 Vt. 512; *Dresser v. Dresser*, 46 Me. 48. But death revokes an agency; therefore, if the agent has not made delivery, or become agent for the donee in the donor's lifetime, the gift fails. *Phipps v. Hope*, 16 Ohio St. 586; *Sessions v. Mosely*, 4 Cush. 87; *Trough's Estate*, 75 Penna. 115; *Helfenstein's Estate*, 77 Penna. 328. No formal delivery is needful where the donee is already in possession of the chattel as bailee for the donor. *Wing v. Merchant*, 57 Me. 383; *Champney v. Blanchard*, 39 N. Y. 111; *Tenbrook v. Brown*, 17 Ind. 410. "Gifts *inter vivos* and gifts *causa mortis* differ in nothing except that the latter are made in expectation of death, become effectual only upon the death of the donor and may be revoked. Otherwise the same principles apply to each." *Davis, J., in Dresser v. Dresser*, 46 Me. 48, 67. In the case of *Butts v. Francis*,

30 N. J. L. 152, a father bought furniture and put it in the house of his son, upon the latter's marriage, saying nothing about its ownership, and it was mortgaged by the son. Thereupon the father claimed the goods and brought replevin against the mortgagee and testified that he did not intend to give the property to his son. *Held*, that the facts raised a strong presumption of a gift to the son. Whelpley, C. J., said: "Mere delivery of the goods will not, in general, pass the title; there must be an intention to give, or the circumstances accompanying the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended; if that be the case, the title to the goods will pass, *although it may not be the secret intention of the donor to make a gift.*" A gift of all one's property is not a valid *donatio mortis causa*. It cannot take the place of a will. *Headley v. Kirby*, 18 Penna. St. 326. Otherwise, as to a particular chattel, though forming the bulk of the estate. *Michener v. Dale*, 23 Penna. St. 59.

6. Sales distinguished from Bailments.—Certain conditional contracts of sale closely resemble bailments. The distinction between a bailment and a sale was stated in *Mallory v. Willis*, 4 N. Y. 85, by C. J. Bronson in these words: "When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale." *Approved*, *Foster v. Pettibone*, 7 N. Y. 435. In the application of these principles there is much diversity. The following are some of the decisions classified according to the bailment in question.

Sale or Deposit—Storage Receipts

Grain Elevators.—In *Norton v. Woodruff*, 2 N. Y. 153, a miller agreed "to take" certain wheat and give one barrel of superfine flour for every four and thirty-six-sixtieths bushels; the flour to be delivered at a fixed time "and as much sooner as I can make it." The wheat was delivered at the mill and accidentally destroyed by fire. *Held*, that the miller's contract was satisfied by a delivery of flour from any wheat, and therefore the delivery of the wheat was not a bailment, but passed title to the miller and left it at his risk. To the same effect see *Smith v. Clark*, 21 Wend. 83; *Carlisle v. Wallace*, 12 Ind. 252; *Ricketts v. Hays*, 13 Ind. 181. In *Mallory v. Willis*, 4 N. Y. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel to be delivered for every four bushels and fifteen pounds of wheat. *Held*, by a divided court, that this was a bailment and not a sale, and the miller having seventy-five barrels left after delivering flour in the required proportion, it was held that the surplus was the property of the bailor. This case was followed in *Foster v. Pettibone*, 7 N. Y. 435. See, also, *Slaughter v. Green*, 1 Rand. 3, (criticised in *Norton v. Woodruff*, 2 Comst. 155); *Inglebright v. Hammond*, 19 Ohio 337. The case of South Australian Insurance Company v. Randall, L. R., 3 P. C. 101, involved the same question. Wheat was delivered by the farmers to millers, who gave storage receipts, and were bound either to return other wheat of the same quality, or to pay at the market rate when demanded. *Held*, that title passed to the millers on delivery. Cases of this character are very frequent in the United States with reference to grain stored in grain elevators. The leading case is *Chase v. Washburn*, 1 Ohio (N. S.) 244, in which Bartley, J., said: "When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each

becomes the owner in common with others of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have if the wheat of each one was kept separate and apart. If this wheat, thus thrown into a common mass, be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper proportion in the common stock. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment; and such a breach of his engagement could not be cured by his procuring other wheat to supply the place of that thus taken. *But if the wheat be thrown into the common heap, with the understanding that the person receiving it may take from it at pleasure, and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale and not a bailment.*" This case has been repeatedly followed. *Lonerger v. Stewart*, 55 Ill. 44; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Beasley*, 87 Ill. 556; *Grier v. Stout*, 2 Ill. App. 602; *Johnston v. Beaver*, 37 Iowa 200; *Nelson v. Brown*, 44 Iowa 455; *Irons v. Kentner*, 51 Iowa 88; *Carlisle v. Wallace*, 12 Ind. 252; *Rahilly v. Wilson*, 3 Dill. 420. The case of *Butterfield v. Lathrop*, 71 Penna. St. 225, is similar in principle. Milk was delivered by farmers at a cheese factory to be manufactured into cheese and sold, and the proceeds divided in proportion to amount of milk sent. *Held*, that there was no bailment. "It was a sale of the milk to the factory, for which they were to pay at a certain time and in a certain manner."

In the recent cases of *Sexton v. Graham*, 53 Iowa 181, and *Nelson v. Brown*, 53 Iowa 555, there is a marked departure from the

previous decisions in that state above cited, and from the rule in *Chase v. Washburn* above quoted. In *Sexton v. Graham* the proprietor of an elevator having received grain and given receipts, intermingled the grain with his own, sold most of the bulk, and pledged the rest to a bank for loans. *Held*, that the delivery was a bailment, and so continued, notwithstanding that an entire change in identity was contemplated and made; that the grain remaining was the property of those who held receipts for grain delivered, as tenants in common, in proportion to their respective deliveries, and that the bank took no interest. This decision cannot be considered very high authority, two out of five judges dissenting, but as a practical rule it has much to recommend it. See 6 Am. Law Rev. 450, for an argument in favor of the view since taken in *Sexton v. Graham*. In *Nelson v. Brown*, *supra*, the same court by the same vote carried out logically the principle adjudged in *Sexton v. Graham*, and where an elevator was destroyed by fire, threw the loss on the farmers holding receipts, although the identical grain delivered by them had been removed. A recent decision in Michigan Supreme Court (*Ledyard v. Hibbard*, June, 1882, not reported,) seems to follow guardedly in this new path.

Sale on Trial.—Where a chattel is delivered on trial, this is a bailment, but may become a sale by acceptance or by delay beyond a time limited for return. *Hunt v. Wyman*, 100 Mass. 198; *Colton v. Wise*, 7 Bradw. 395. See Book IV., Part I., *infra*.

Sale or Return.—See Book IV., Part I., *infra*. In *Westcott v. Thayer*, 18 N. Y. 363, a brewer sold ale in barrels, and the buyer agreed that the barrels should be returned, but if not, then the buyer should pay \$2 each. *Held*, that this did not pass the title to the buyer, nor authorize him to sell the barrels, but fixed the damages in case of loss or destruction. This decision was based upon the express

agreement of the buyer that he would make return.

Sale or Consignment to Sell.—Where goods were delivered by plaintiffs to be sold at a price fixed by them, and paid for at fixed rates by the consignee after sale, accounts to be given monthly—*Held*, a consignment for sale, not a sale. *Audenziel v. Betteley*, 8 Allen 302. And in the similar case of *Walker v. Butterick*, 105 Mass. 238, the court said: "The terms of the contract that A & Co. are to take goods from plaintiffs, and return to them every thirty days the amount of sales at the prices charged by the plaintiffs, who will furnish A & Co. all goods in their line, imports a consignment and not a sale." But in *Nutter v. Wheeler*, 2 Low. 346, where goods were delivered on an agreement that they should be paid for at a certain price within thirty days after they were sold by the consignee, who fixed the terms of his own sales, *Lowell, J.*, said that the consignee "should be considered as the purchaser, subject only to the understanding that he was neither the owner of the goods nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals." Followed in *In re Linforth*, 4 Sawy. 370. A consignment of goods to be paid for as sold, but at all events to be paid in twelve months, is a present sale. *Fish v. Benedict*, 74 N. Y. 613. Where a piano was sold, title not to pass till paid for, but the buyer having power to sell—*Held*, that no title passed until payment was made. *Cole v. Mann*, 62 N. Y. 1. See, also, *Bayliss v. Davis*, 47 Iowa 340; *Brothers v. Davis*, 47 Iowa 363, (where a delivery was held a consignment to sell and not a sale, although the consignor gave his note for the price, such being the intent of the parties.) *Dodds v. Denant*, 5 U. C. Q. B. 623; *Mar-*

latt v. Gooderham, 14 Id. 221. See *Eldridge v. Benson*, 7 Cush. 483, criticised in note, Book IV., *infra*.

Sale or Pledge—Sale or Mortgage.—The question whether a transaction is a sale or is a pledge or mortgage usually arises—*first*, where possession of goods is transferred on account of an existing indebtedness; *second*, where a right to have a return of the goods on making a certain payment is reserved to the seller. The principles are the same whether land or personalty is in question. 2 Lead. Cas. in Eq. 1990 (4th Am. ed.) *First*. The test applied in these cases is this: if the debt, on account of which the transfer is made, is not satisfied by the delivery, the transaction is a pledge or mortgage; if it is extinguished, it is a sale, and the agreement for repurchase is an independent contract. *Smith v. Beattie*, 31 N. Y. 542; *Houser v. Kemp*, 3 Penna. St. 208; *Todd v. Campbell*, 32 Id. 250; *Reeves v. Sebern*, 16 Iowa 234; *Cooper v. Brock*, 41 Mich. 488; *Musgat v. Pumpelly*, 46 Wis. 660; *Slowey v. McMurray*, 27 Mo. 113; *Hickox v. Lowe*, 10 Cal. 197; *Robinson v. Willoughby*, 65 N. C. 520; *Ruffier v. Womack*, 30 Tex. 332; *Moore v. Murdock*, 26 Cal. 514; *Blodgett v. Blodgett*, 52 Vt. 32; *Wilmerding v. Mitchell*, 13 Vr. 476. In *Sutphen v. Cushman*, 35 Ill. 186, 196, *Beckwith, J.*, said: "The appellant was indebted to the appellee at the time the conveyance was made, and there is no evidence whatever of the discharge of that indebtedness. The bond and note, by which the greater portion of it was evidenced, were retained by the appellee, and the payment of the indebtedness might have been enforced. Until the contrary is shown the presumption is that the debt was not satisfied by the conveyance." Therefore the transaction was held a mortgage. In *Turner v. Kerr*, 44 Mo. 429, 432, *Currier, J.*, said: "That the amount of money to be paid as a condition to the right to demand a recon-

veyance is measured by the amount of the debt and interest, is a circumstance of no controlling importance. It may often happen that a creditor would consent to take an absolute title, stipulating for a reconveyance, when he would reject a mortgage, because of the delay and expense upon a foreclosure. Such arrangements operate beneficially to the debtor, securing him additional time to extricate himself from embarrassment. Where the parties intend a conditional sale and not a mortgage, and make their contracts in accordance with their intentions, it is not the province of the courts to circumvent their intentions. It is, nevertheless, true that neither the intention of the parties nor their express contracts can change the essential nature of things. A conveyance to *secure* a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to *pay* a debt is a totally different affair. If the conveyance extinguishes the debt and the parties so intend, so that a plea of payment would bar an action thereon, a subsequent or cotemporaneous stipulation in the interest of the debtor, securing to him an opportunity to re-acquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale."

Second. Where a right is reserved on delivery of goods for money, to reclaim them on payment of a fixed price, the inquiry is whether the transaction creates a debt. If the purchaser can compel the repayment, the transaction will be held a loan on pledge of the goods, especially if the fixed price is the same amount paid on delivery. But if it is optional with the vendor whether or not he will pay the price and reclaim the goods, the transaction is a sale and title passes, the vendor holding only a right to repurchase, which he will lose if he does not exercise in the time limited. The leading case is *Conway v. Alexander*, 7 Cranch 218, where the trans-

action was held a sale. C. J. Marshall said: "It is a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of his debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument." See *Slutz v. Desenberg*, 28 Ohio St. 371; *Magee v. Catching*, 33 Miss. 672; *Moore v. Sibbald*, 29 U. C. Q. B. 487; *Mahler v. Schloss*, 7 Daly 291; *Henry v. Houghtaling*, 41 Cal 22. In *Glover v. Payne*, 19 Wend. 518, Bronson, J., said: "Where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute conveyance into a mortgage."

Sale or Hiring of Services upon Chattels (Locatio Operis Faciendi).—Where the owner of goods delivers them to be manufactured and returned to him for sale, the transaction is sometimes a sale and sometimes a bailment to the manufacturer. The test is usually this: if the contract provides that the goods, when delivered, shall be charged to the manufacturer, and that, when returned and sold, the proceeds of sale of the manufactured goods shall be credited to him, it is a sale to the manufacturer with a return to the vendor to sell as agent. But if the goods are to be returned when manufactured, to be sold by the bailor for his own account, the original delivery is a bailment, and the mere fact that the goods are charged to the manufacturer when delivered to him, will not make it a sale. Somewhat at variance with this statement of the law, however, is the case of *Schenck v. Saunders*, 13 Gray 37. A shoe dealer made an agreement with a manufacturer to furnish him materials to be made into boots, and consigned to the dealer, who was to sell the same for cash, on a commission of five per cent. and to make returns as fast as sold. No provision was made as to payment for materials, but the dealer sent bills with

the goods and deducted the price from the proceeds. The manufacturer having pledged some of the boots to defendant, the dealer brought trover. *Held*, that the title was in the dealer, and the pledge was void, the manufacturer being but a bailee. This decision may be sustained on another ground, for it appeared that the pledgee had notice of the agreement, and therefore knew that the pledge was in fraud of the dealer's rights under the contract. The facts that the manufacturer took all chances of profit and loss on the manufactured product, indicated a transfer of title to him. This view is supported by the case of *Dittmar v. Norman*, 118 Mass. 319, which seems, in effect, to overrule the grounds of the decision in *Schenck v. Saunders*, and the similar case of *Eldridge v. Benson*, 7 Cush. 483. In *Dittmar v. Norman* an inventor of "dualin" agreed with a dealer that the latter should furnish materials and money to be employed by the inventor in manufacturing dualin, the product to be consigned to the dealer, who should have the exclusive sale, cost of materials and advances to be charged to the manufacturer against the proceeds of the manufactured goods, net profits to be equally divided. *Held*, that title to the dualin was in the manufacturer, and that the dealer was selling agent only. To the same effect is *Pritchett v. Cook*, 62 Penna. 193, where plaintiffs furnished hides at their cash prices to defendant, who agreed to tan them and deliver the leather to plaintiffs, who were to sell it for five per cent. commission, and account to defendant, deducting the price of the hides. *Held*, a sale of the hides to defendant and not a bailment. See, also, *Jenkins v. Eichelberger* 4 Watts 121; *Butterfield v. Lathrop*, 71 Penna. 225.

Sale or Lease with Privilege of Purchase.—Transactions of this character are very frequent on sales of sewing machines, pianos, safes, railroad cars and

furniture. They usually provide for the payment of monthly rent, and that when the amount of rent paid equals a certain sum, being the price of the property leased, a bill of sale shall be given. In case of default the lessor may retake the property, and the payments being in form, rent, are forfeited. No doubt the chief design in these transactions is to effect a sale, with the price payable in installments, and the form of lease is used to reserve to the vendor a more summary and efficient remedy in case of non-payment than a chattel mortgage would give. The hardship of a forfeiture, where nearly all the price has been paid under the name of rent, has led to much litigation, in which the claim for the buyer is always made, that the transaction is in fact a sale with a lien for price reserved. Generally, however, the courts have enforced these contracts according to their plain terms, and have held that if the buyer saw fit to sign a lease, he must be regarded as bailee and not as purchaser. *Chamberlain v. Smith*, 44 Penna. St. 431; *Crist v. Kleber*, 79 Id. 290; *Enslow v. Klein*, 79 Id. 488; *Rose v. Story*, 1 Id. 190; *Myers v. Harvey*, 2 Penna. 479; *Sumner v. Cottey*, 71 Mo. 121; *Sargent v. Giles*, 8 N. H. 325; *Rowe v. Sharp*, 51 Penna. 26; *Bailey v. Colby*, 34 N. H. 29; *Austin v. Dye*, 46 N. Y. 500; *Clark v. Jack*, 7 Watts 375; *Henry v. Paterson*, 57 Penna. St. 346; *Bean v. Edge*, 84 N. Y. 510; *Haviland v. Johnson*, 7 Daly 297. See cases under head of conditional sales of specific chattels, Book II., Chap. III. But the doctrine of these cases must be considered as shaken by two recent decisions in the United States Supreme Court, *Hervy v. R. I. Locomotive Works*, 93 U. S. 664, and *Heryford v. Davis*, 102 U. S. 235. In the former case the court refused to consider the installments to be paid for a locomotive as rent, although expressly so declared in the agreement between the parties, but held the case one of sale reserving a secret lien which was

declared void as against creditors of the buyer under the Illinois chattel mortgage act. Justice Davis said: "It is true that the instrument of conveyance purports to be a lease, and the sums to be paid are for rent; but this form was used to cover the real transaction. It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last installment?" As between the contracting parties the same court afterwards sustained a similar agreement according to its terms, in the case of *Fosdick v. Schell*, 99 U. S. 235. Both of these cases may be distinguished from those above cited, by the fact that the court held itself bound by the law as settled in the courts of Illinois, but the same cannot be said of *Heryford v. Davis*, 102 U. S. 235, from Missouri. In this case car manufacturers delivered cars to a railroad company under a written contract, "to be used on the railroad for hire." No rent was named, but it was agreed that notes should be given for the estimated value, and that the railroad company should have the right to purchase the cars for a fixed price within four months, but until payment in full was made the company should have no interest in the cars "except as to their

use or hire." The cars having been levied on by a creditor of the company, were claimed by the manufacturers. Justice Strong said: "Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire, it is manifest that no mere bailment for hire was intended. No price for the hire was mentioned, and in every bailment for hire a price is essential. The amount may not be stipulated, but the contract must contemplate payment for the use of the thing bailed." "It is quite unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale." "Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale." *Held*, that as against the execution creditor the contract was void for want of filing as a chattel mortgage. From this decision Justice Bradley emphatically dissents. In Illinois and Kentucky it is held that leases of the class in question are in fact chattel mortgages, in spite of their terms. *Murch v. Wright*, 46 Ill. 487, cited and followed in *Hervey v. R. I. Locomotive Works*, *supra*; *Lucas v. Campbell*, 88 Ill. 447; *Greer v. Church*, 18 Bush 430.

CHAPTER II.

OF THE PARTIES TO THE CONTRACT.

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§ 5. So far as the general capacity to contract is concerned, and the rules of law relating to persons either totally incompetent to contract, or protected from liability by reason of infancy, coverture, and the like causes, the reader must be referred to treatises which embrace the subject of contracts in general. Such rules and principles as are specially applicable to sales of goods will be examined in this chapter.

SECTION I.—WHO MAY SELL.

§ 6. In general, no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet.* (a)¹ A person, there-

(a) *Peer v. Humphrey*, 2 Ad. & E. 496; *Whistler v. Foster*, 32 L. J., C. P. 161.

1. One wrongfully in possession of goods cannot sell them.—*The Fanny*, 9 Wheat. 658; *Ventress v. Smith*, 10 Pet.

fore, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some special cases presently to be noticed): and even if, in ignorance of the fact that the goods were lost or stolen, he resell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon. (b)² But a man may make a valid *agreement to sell* a thing not yet his, and even a thing not yet in existence; this *executory* contract will be examined in the next chapter, which treats of the things sold.

176; *Wooster v. Sherwood*, 25 N. Y. 278, 286; *Brown v. Peabody*, 13 N. Y. 121; *Saltus v. Everett*, 20 Wend. 267; *Fawcett v. Osborn*, 32 Ill. 411; *Creighton v. Sanders*, 89 Ill. 543; *Pearce v. Bowker*, 115 Mass. 129; *Moody v. Blake*, 117 Mass. 23; *Prime v. Cobb*, 63 Me. 200; *Ruckman v. Decker*, 8 C. E. Gr. 283; *Hoffman v. Carow*, 22 Wend. 285, 290; *McGoldrick v. Willets*, 52 N. Y. 612.

The owner may sell his goods though in possession of a trespasser. —It was formerly held that no transfer could be made of goods held by another under an adverse claim of title, because such claim was considered a mere chose in action and therefore not assignable. *Overton v. Williston*, 31 Penna. 160; *Gardner v. Adams*, 12 Wend. 297; *McGoon v. Ankenny*, 11 Ill. 558; *O'Keefe v. Kellogg*, 15 Ill. 347; *Young v. Ferguson*, 1 Litt. 298; *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Dunklin v. Wilkins*, 5 Ala. 199. These cases seem to be against the modern authorities which proceed upon the theory that the owner is not bound to treat an invasion of his right of property as a tortious conversion, but may waive the tort and sell and convey good title. *Tome v. Dubois*, 6 Wall. 548; *Hall v. Robinson*, 2 N. Y. 293, (criticising *Gardner v. Adams*, *supra*); *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Id. 147; *Carpenter v. Hale*, 8 Gray 157. Notwithstanding the owner of a

chattel tortiously taken has sold it, he may afterwards maintain an action for damages for the tort. *Clark v. Wilson*, 103 Mass. 219.

(b) *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 559.

2. *Vermilye v. Adams Express Co.*, 21 Wall. 138; *Ventress v. Smith*, 10 Pet. 161; *Pease v. Smith*, 61 N. Y. 477; *Williams v. Merle*, 11 Wend. 180; *Heckle v. Lurvey*, 101 Mass. 344; *Breckenridge v. McAfee*, 54 Ind. 141. One who innocently assists a trespasser in effecting a sale of chattels is liable to the true owner, and on this principle an auctioneer who innocently sells stolen goods is liable. *Knapp v. Hobbs*, 50 N. H. 476; *Dudley v. Hawley*, 40 Barb. 397; *Hoffman v. Carew*, 22 Wend. 285; *Cobb v. Dows*, 10 N. Y. 335; *Story on Agency*, § 312; *Sharp v. Parks*, 48 Ill. 511. A mere depositary, who in good faith returns the goods to the depositor, is not liable, though the depositor stole the goods. *Hill v. Hayes*, 38 Conn. 532; *Dudley v. Hawley*, 40 Barb. 397; *Loring v. Mulcahy*, 3 Allen 575. And in *Spooner v. Holmes*, 102 Mass. 503, it was held that one who innocently sells stolen *negotiable* securities for the thief incurs no liability.

§ 7. In general, also, any person competent to contract may sell goods of which he is owner, and convey a perfect title to the purchaser.³ But if the buyer has notice that any writ, by virtue of which the goods of the vendor might be seized or attached, has been delivered to and remains unexecuted in the hands of the sheriff, under-sheriff, or coroner, the goods purchased by him are liable to seizure in his hands under such writ, by virtue of the statutes 29 Car. II., c. 3, and 19 and 20 Vict., c. 97, § 1. The delivery of the writ to the sheriff binds the property from the date of delivery, but does not change the ownership; so that the vendor's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor. (c) If, however, the purchaser had no notice of the existence of the writ in the sheriff's hands, the first section of the act 19 and 20 Vict., c. 97, called the "Mercantile Law Amendment Act," protects him, by providing that no such writ "shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ." (d)⁴

3. The owner of goods mortgaged may sell subject to the mortgage. Under the chattel mortgage acts a purchaser *bona fide* will take title clear of a mortgage not filed. But if filed it binds the goods, though removed to another state and sold there to a *bona fide* purchaser. *Parr v. Brady*, 8 Vr. 201; *Runyon v. Groshon*, 1 Beas. 86. The owner's sale is voidable if made in fraud of the buyer, or of the vendor's creditors. See "Fraud," chapter II., book III. In some of the states it is held that after a sale sufficient to pass title between the parties, but without delivery, a subsequent *bona fide* purchaser from the same vendor, acquires good title if he is the first to gain possession. *Winslow v. Leonard*, 24 Penna. St. 14; *Veazie v. Somerby*, 5 Allen 280. These decisions rest on the theory that possession retained by the vendor after sale is *conclusive* proof of fraud against creditors and subsequent purchasers. See the chapter on "Fraud," *infra*, and notes.

(c) *Woodland v. Fuller*, 11 Ad. & E. 859.

(d) This section is not retrospective in

its operation, and does not affect pre-existing rights. *Williams v. Smith*, 26 L. J., Ex. 371; 2 H. & N. 443, and in error, 28 L. J., Ex. 286; 4 H. & N. 559; *Flood v. Patterson*, 30 L. J., Ch. 486; and *Jackson v. Woolley*, 8 E. & B. 778; 27 L. J., Q. B. 181, 448. The subsequent statutes of 23 and 24 Vict., c. 38, and 27 and 28 Vict., c. 112, furnish the rules on this subject, in respect of land, including leasehold titles to land.

4. Goods may be sold by the owner, though in the custody of the sheriff on execution or attachment, or of the landlord on distress for rent, such sale being subject to the creditor's lien. *Klinck v. Kelly*, 63 Barb. 622; *Mumper v. Rushmore*, 14 Hun 591; *Cooke v. Woodrow*, 1 Cranch C. C. 437; *Storey v. Agnew*, 2 Brad. 353; *Coghill v. Boring*, 15 Cal. 213; *Fettyplace v. Dutch*, 13 Pick. 388; *First Ward Nat. Bank v. Thomas*, 125 Mass. 278; *Hooker v. Jarvis*, 6 U. C. Q. B. (O. S.) 439; *Wheeler v. Nichols*, 32 Me. 233; *Horne v. Briggs*, 93 Mass. 510; *Arnold v. Brown*, 24 Pick. 89.

§ 8. The first and most important exception to the rule that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in *market overt*.⁵

Exceptions to rule that owners only can sell.

Market overt in the country is held on special days, provided by charter or prescription; (e) but in London every day except Sunday is market day. (f) In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in. (g)

Market overt.

As a London shop is not a market overt for any goods except such as are usually sold there, it was held in the leading case (g) that a scrivener's shop was not a market overt for plate, though a goldsmith's would have been. So Smithfield was held not to be a market overt for clothes, but only for horses and cattle; (h) and Cheapside not for horses; (i) and Aldridge's not for carriages. (k)

A wharf is not a market overt, even in the city of London. (l)

In *Crane v. The London Dock Company* in the Queen's Bench, the common law doctrine of market overt was much discussed, and the Chief Justice expressed the opinion that a sale could not be considered as made in market overt "unless the goods were exposed in the market for sale, and the whole transaction begun, continued and completed in the open market; so as to give the fullest opportunity to

5. There are no markets overt in the United States. (Whether any in the province of Ontario, *quære*. *Bowman v. Yielding*, 1 Rob. & J. Dig. 2226.) Therefore a buyer from a thief acquires no title. *Ventress v. Smith*, 10 Pet. 161; *Dana v. Baldwin*, 8 Mass. 518; *Hoffman v. Carow*, 22 Wend. 285; *Easton v. Worthington*, 5 Serg. & R. 130; *Browning v. Magill*, 2 Harr. & J. 308; *Bryant v. Whit-cher*, 52 N. H. 158; *Black v. Jones*, 64 N. C. 318; *Dawson v. Swong*, 1 Heisk. 243; *Roland v. Gundy*, 5 Ohio 202; *Coombs v. Gordon*, 59 Me. 111; *Fawcett v. Osborn*, 32 Ill. 425; *Jones v. Nellis*, 41 Ill. 482.

(e) See *Benjamin v. Andrews*, 5 C. B. (N. S.) 299; 27 L. J., M. C. 310.

(f) *Case of Market Overt*, 5 Rep. 83 b; *L'Evesque de Worcester's Case*, Moore 360; Poph. 84; *Comyn's Dig.*, "Market," E; 2 Bl. Com. 449; *Lyons v. De Pass*, 11 Ad. & E. 326; *Crane v. The London Dock Company*, 33 L. J., Q. B. 224; S. C., 5 B. & S. 313; *Anon.*, 12 Mod. 521.

(g) 5 Rep. 83 b.

(h) Moore 360.

(i) *Ib.* See also *Taylor v. Chambers*, Cro. Jac. 68.

(k) *Marner v. Banks*, 17 L. T. (N. S.) 147; 16 W. R. 62.

(l) *Wilkinson v. King*, 2 Camp. 335.

the man whose goods have been taken to make pursuit of them, and prevent their being sold." (m)

[The doctrine of sale in market overt exists for the protection of the *innocent purchaser*: it was therefore held in a recent Irish case that an *innocent vendor* was not relieved from liability by such a sale and was responsible in an action of trover by the rightful owner for the value of the goods sold. (n)]

§ 9. The exceptions to the validity of sales made in *market overt* by one who is not the owner, and the rules of law governing the subject, are fully treated by Lord Coke, in 2 Inst. 713, and have been the subject of numerous decisions. A sale in market overt does not give a good title to goods belonging to the sovereign; nor protect a buyer who knew that they were not the property of the seller, or was guilty of bad faith in the transaction. The purchaser is not protected if the sale be made in a covert place, as a back room, warehouse or shop with closed windows; or between sunset and sunrise; or if the treaty for sale be begun out of market overt. The privilege of market overt does not extend to gifts, (o) nor to sales of pawns taken to any pawnbroker in London, or within two miles thereof; (p) and if the original vendor, who sold without title, come again into possession of the goods after any number of intervening sales, the right of the original owner revives. (q)

§ 10. A sale by sample is not a sale in market overt, and in *Hill v. Smith*, (r) Sir James Mansfield, C. J., said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market." This decision was approved and followed by the Queen's Bench in *Crane v. The London Dock Company*. (s)

(m) Per Cockburn, C. J., in *Crane v. The London Dock Company*, 5 B. & S. 313; 33 L. J., Q. B. 224.

(n) *Ganley v. Ledwidge*, 10 Ir. R. C. L. 33.

(o) 2 Inst. 713; 2 Bl. Com. 499; *Hartopp v. Hoare*, 2 Str. 1187; *Wilkinson v. King*, 2 Camp. 335; *Packer v. Gillies*, 2 Camp. 336, note; cases cited in *Crane v. The London Dock Company*, 33 L. J., Q. B. 224; 5 B. & S. 313.

(p) 1 Jac. I., c. 21, § 5; *Hartopp v. Hoare*, 3 Atk. 44.

(q) 2 Bl. Com. 450; 2 Inst. 713; and see per Best, J., in *Freeman v. East India Company*, 5 B. & A. 624.

(r) 4 Taunt. 532.

(s) 33 L. J., Q. B. 224; 5 B. & S. 313. See *Bailiffs, &c., of Tewkesbury v. Diston*, 6 East 438; *Newtownar v. Commissioners v. Woods*, 11 Ir. R. C. L. 506.

In *Lyons v. De Pass*, (t) a sale was held to be entitled to the privilege of market overt where made in a shop in the city of London to the shopkeeper who dealt in such goods: but the point was not raised, and the existence of the privilege in such a case was strongly questioned by the judges in *Crane v. The London Dock Company*. (u)

Purchase by shop-keeper in London.

Lyons v. De Pass.

§ 11. The security of a purchaser in market overt who innocently buys stolen goods, is affected by the statute 24 and 25 Vict., c. 96, § 100, which re-enacts and adds to the 7 and 8 Geo. IV., c. 29, § 57. (x) By the terms of this section, it is provided that,—“If any person guilty of any such felony or misdemeanor, as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.”

Where true owner prosecutes felon.

24 and 25 Vict., c. 96, § 100.

It has been settled, that on the true construction of this statute, the property in the chattel becomes revested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the court. (y) But [even where the goods had been stolen] an action was held not to be maintainable against an innocent purchaser in market overt, who had disposed of the stolen goods before the conviction of the thief; although he was, while the goods still remained in his possession, notified of the robbery by the original owner. (z)

§ 12. [It has recently been decided that the statute has no application in cases of false pretences (i. e., where the property in the goods has passed), and therefore that the title of a *bona*

Does not apply in cases of false pretences.

(t) 11 Ad. & E. 326.

506; 19 L. J., Q. B. 447. See, also *Peer, v. Humphrey*, 2 Ad. & E. 495.

(u) See note (s), p. 16.

(x) See, also, 21 Henry VIII., c. 11, and *Parker v. Patrick*, 5 T. R. 175.

(z) *Horwood v. Smith*, 2 T. R. 750; *Lindsay v. Cundy*, 1 Q. B. D. 348.

(y) *Scattergood v. Sylvester*, 15 Q. B.

Lindsay v. Cundy. *fide* purchaser from the person who has obtained the goods by false pretences is paramount to the title of the original owner, even after the conviction. (a)

It should be observed, however, that in *Lindsay v. Cundy*, (b) upon the authority of which case *Moyce v. Newington* was decided, Lush, J., was careful to say (p. 362): "The plaintiffs may, *upon conviction*, acquire a fresh title to the goods, but then they must get the goods *from the person in whose hands they can find them, or what may be the substitute for the goods.*" All that *Lindsay v. Cundy* seems to decide is that, *until conviction*, a *bona fide* purchaser from the person who had obtained the goods by false pretences had a good title; and if, *before conviction*, he had parted with the goods, no action of trover could be maintained against him. In other words, the title to the goods reverts in the original owner as from the date of the conviction, and does not relate back to the time of the fraudulent taking.

It is otherwise where the *possession* only of the goods has been obtained by some trick, or by theft, without the property passing; and the earlier cases of *Scattergood v. Sylvester*, 15 Q. B. 506, and *Peer v. Humphrey*, 2 Ad. & E. 495, are in this way reconcilable with *Lindsay v. Cundy* and *Moyce v. Newington*.

In *Walker v. Matthews*, (c) two cows in calf had been stolen from the plaintiff's farm on the 7th of June, 1880. On the 11th of June they were sold in market overt to a dealer, who afterwards resold them to the defendant, who was a *bona fide* purchaser. After the conviction of the thief, on the 5th of April, 1881, the plaintiff demanded back the cows from the defendant, who refused to give them up. Meantime the cows had calved. In an action for the return of the cows, the defendant set up a counter-claim for the cost of their keep between the time of the sale and the conviction; held, that *as the cows were the defendant's property up to the time of the conviction* of the thief, the counter-claim was not maintainable. The defendant, it is to be observed, did not dispute the plaintiff's title to the calves, although they were born during the time when the property in the cows was vested in the defendant.]

§ 13. When an innocent purchaser of stolen goods has been forced

(a) *Moyce v. Newington*, 4 Q. B. D. 32, where the sale was not in market overt. ble exposition of the statutes, and expressly dissents from *Nickling v. Heaps*, 21 L. T. (N. S.) 754.

(b) 1 Q. B. D. 348, not overruled on this point. Blackburn, J., gives a valua-

(c) 8 Q. B. D. 109.

to make restitution to the prosecutor of the thief, the 30 and 31 Vict., c. 35, § 9, enacts that upon the conviction of the thief it shall be lawful for the court to order that any money taken from him on his apprehension shall be applied to reimbursing the purchaser the price paid by him.

Reimbursement to innocent purchaser.

It was at one time supposed that where goods had been stolen, an owner could not recover them from an innocent vendee who had bought them, *not* in market overt, until he had done his duty in prosecuting the thief. But the cases of *Gimson v. Woodfall* (*d*) and *Peer v. Humphrey* (*e*) were overruled in *White v. Spettigue*, (*f*) where it was held, on the authority of *Stone v. Marsh*, (*g*) and *Marsh v. Keating*, (*h*) that the obligation of the plaintiff to prosecute the thief does not apply where the action is against a third party innocent of the felony. And in *Lee v. Bayes* (*i*) the law was stated to be settled in conformity with the decision in *White v. Spettigue*. (*f*)

Owner not bound to prosecute before recovering from innocent third person goods not sold in market overt.

In *Wells v. Abrahams*, (*k*) on the trial of an action of trover, the evidence established a *prima facie* case of felony, and after verdict for plaintiff a new trial was moved for on that ground and on the further ground shown by affidavit, that since verdict the plaintiff had prosecuted the defendant criminally. But held that the judge was bound to try the cause on the record as it stood at *Nisi Prius*, and could not nonsuit the plaintiff—and the verdict was upheld.

Wells v. Abrahams.

[In *Ex parte Ball*, *In re Shepherd*, (*l*) the doctrine in question was very fully considered, and the Court of Appeal, while hesitating to say that the alleged rule had no existence in practice, expressed a decided opinion that the disability to sue was confined to the person injured by the felony, and therefore had no application to the case before them, so as to bar a claim made by the injured party's trustee in bankruptcy against the felon's estate. *Bramwell and James, L. JJ.*, dwelt strongly upon the difficulties which from every point of view beset the application of the doctrine.]

§ 14. For more than three centuries it has been found necessary to

(*d*) 2 C. & P. 41.

(*e*) 2 Ad. & E. 495; 4 N. & M. 430.

(*f*) 13 M. & W. 603.

(*g*) 6 B. & C. 551.

(*h*) 1 Bing. N. C. 198.

(*i*) 18 C. B. 599.

(*k*) L. R., 7 Q. B. 554.

(*l*) 10 Ch. D. 667, C. A. See, also, *Midland Insurance Company v. Smith*, 6 Q. B. D. 561, where all the cases are reviewed by *Watkin Williams, J.*

Sale, horses in market overt. make special provision in relation to the sale of *horses* in market overt, on account of the peculiar facility with which these animals, when stolen, can be removed from the neighborhood of the owner and disposed of in markets and fairs.

The statute of 2 and 3 P. & M., c. 7, passed in 1555, and that of 31 Eliz., c. 12, in 1589, contain the rules and regulations applicable to this subject. The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place; that the parties to the bargain shall be before him present when he takes the toll; and that he shall write in a book, to be kept for that purpose, the names, surnames, and dwelling-places of the parties, and a full description of the animal sold. The property in the horse is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the vendor, and "of his true Christian name, surname, and place of dwelling or resiancy;" or that the vendor shall bring to the keeper one sufficient and credible person that can testify that he knows the vendor, and in such case the name and residence of the person so testifying, as well as those of the vendor, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale is to be void. The act also provides that the original owner may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided the demand on the purchaser be made within six months from the date of the felony.

The decisions on these two statutes are collected in Bacon's Abr., "Fairs and Markets," and in Com. Dig., "Market," E. Their provisions have been found so effective in putting an end to the mischief which

they were intended to prevent, that there are very few modern cases on the subject. (m)

In *Lee v. Bayes*, (m) it was held that the sale of a horse at auction in a repository out of the city of London, was not a sale in market overt, *Jervis, C. J.*, saying that market overt was "an open, public, and *legally-constituted* market."

Horse repository outside of London not market overt.

On the question, What is a legally-constituted market? the reader is referred to the case of *Benjamin v. Andrews*, (n) decided in the Common Pleas in 1858.

What is a legally-constituted market?

[The protection attendant upon a sale in market overt is not confined to ancient markets created by charter or prescription, but extends to modern markets established under powers conferred by act of parliament.] (o)

Protection extends to modern markets.

§ 15. The second exception to the rule that one not the owner cannot make a valid sale of personal chattels, also arises out of the 24 and 25 Vict., c. 96, § 100, already quoted, which directs that—"If it shall appear before any award or order made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods for any misdemeanor against this act."

Sale of negotiable securities by one not owner.

This clause was intended to prevent the statute from operating in such manner as to interfere with a settled rule of the law merchant, namely, that one not the owner, even the thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin,

(m) See *Joseph v. Adkins*, 2 Stark. 76; *Lee v. Bayes*, 18 C. B. 599; *Moran v. Pitt*, 42 L. J., Q. B. 47; 21 W. R. 554.

(n) 5 C. B. (N. S.) 299; 27 L. J., M. C. 310.

(o) *Ganley v. Ledwidge*, 10 Ir. R. C. L. 33.

according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case he would be forced to bear the loss. (p) ⁶

§ 16. Another case, in which one not the owner of goods may make valid sale of them, is that of the pawnee. He has the legal power to sell goods pledged to him, if the pawnor make default in payment at the stipulated time; and this he may do without taking any legal proceedings against the pawnor. (q) ⁷

§ 17. The sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution, and confer a valid title on the purchaser: and this title will not be affected, although the writ of execution be afterwards set aside. (r) ⁸

(p) *Grant v. Vaughan*, 3 Burr. 1516; *Lang v. Smith*, 7 Bing. 284; *Gagier v. Mieville*, 3 B. & Cr. 35; *Crook v. Jadia*, 5 B. & Ad. 909; *Backhouse v. Harrison*, 5 B. & Ad. 1105; *Bank of Bengal v. M'Leod*, 7 Moo. P. C. 35; *Goodman v. Harvey*, 4 Ad. & E. 870; *Uther v. Rich*, 10 Ad. & E. 784; *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33; *Seal v. Dent*, 8 Moo. P. C. 319; *Gill v. Cubitt*, 3 B. & Cr. 466; *Whistler v. Forster*, 32 L. J., C. P. 161. See, also, numerous other cases cited in notes to *Miller v. Race*, 1 Sm. L. C. 516 (ed. 1879); *Byles on Bills*, 165 (13th ed.).

6. *Goodman v. Simonds*, 20 How. 343; *Newton v. Porter*, 69 N. Y. 133, 137; *Spooner v. Hughes*, 102 Mass. 503; *Jones v. Nellis*, 41 Ill. 482; *Matthews v. Poythress*, 4 Ga. 287; *Brush v. Scribner*, 11 Conn. 388; *Seybel v. Nat. Currency Bank*, 54 N. Y. 288. But, otherwise, as to over-due paper. *Vermilye v. Adams Express Co.*, 21 Wall. 138.

(q) *Pothonier v. Dawson*, Holt 385; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 9 Mod. 278; *Martin v. Read*, 11 C. B. (N. S.) 730, and 31 L. J., C. P. 126; *Johnston v. Stear*, 15 C. B. (N. S.) 330, and 33 L. J., C. P. 130; *Pigot v. Cubley*, 15 C. B. (N. S.) 701, and 33 L. J., C. P. 134; 1 Sm. L. C. 227, (Ed. 1879); *Halliday v. Holgate*, L. R., 3 Ex. 299.

By the above case of *Martin v. Read*, and by *Reeves v. Capper*, 5 Bing. N. C. 136, and *Langton v. Waring*, 18 C. B. (N. S.) 315, it appears that there may be a valid pledge although the goods remain in, or are returned to, the actual possession of the pawnor as trustee for the pawnee.

7. *Stearns v. Marsh*, 4 Denio 227; *Bryan v. Baldwin*, 52 N. Y. 233; *Gay v. Mass*, 34 Cal. 125; *Donohue v. Gamble*, 38 Cal. 340; *Cushman v. Hayes*, 46 Ill. 145; *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Davis v. Funk*, 39 Penna. 243; *Conyngham's Appeal*, 57 Penna. 474; *Wilson v. Little*, 2 N. Y. 442; *Alexandria Railroad v. Burke*, 22 Gratt. 254; *Potter v. Thompson*, 10 R. I. 1; *Stokes v. Frazier*, 72 Ill. 428; *City Bank of Racine v. Babcock*, 1 Holmes (U. S. Cir.) 180; *Wheeler v. Newbould*, 16 N. Y. 392; *Strong v. Nat. Banking Assoc.*, 45 N. Y. 718; *Washburn v. Pond*, 2 Allen 474; *Ainsworth v. Bowen*, 9 Wis. 348; *Lewis v. Mott*, 36 N. Y. 395; *Hamilton v. State Bank*, 22 Iowa 306.

(r) *Anon.*, Dyer 363 a, pl. 24; *Turner v. Felgate*, 1 Lev. 95; *Manning's Case*, 8 Co. 91; *Doe, d. Emmett, v. Thorn*, 1 M. & S. 425; *Doe v. Murlass*, 6 M. & S. 110; *Farrant v. Thompson*, 5 B. & Ald. 826; *Lock v. Sellwood*, 1 Q. B. 736.

8. *Bank of United States v. Bank of Washington*, 6 Pet. 8; *Williams v. Cum-*

This protection, however, was held by the Court of Queen's Bench not to be available in favor of a purchaser of goods distrained under a warrant issued by two justices of the peace to the constable, *where the warrant was on the face of it illegal.* (s) ⁹

§ 18. Another instance of the power of one who is not owner to transfer the property in goods held in his possession, is that of the master of a vessel, who is vested by law with ^{Masters of ships.} authority to sell the goods of the shippers of the cargo in case of absolute necessity; as where there is a total inability to carry the goods to their destination, or otherwise to obtain money indispensable for repairs to complete the voyage. But the purchaser acquires no title, unless such necessity exists. (t) ¹⁰

§ 19. By the factors' act (6 Geo. IV., c. 94, § 2,) "persons en-

mins, 4 J. J. Marsh. 637; Barney v. Paterson, 6 Harr. & J. 182; McLagan v. Brown, 11 Ill. 519; Herrick v. Graves, 16 Wis. 157; Stinson v. Ross, 51 Me. 556; Wilkinson's Appeal, 65 Penna. 189; Spade v. Bruner, 72 Penna. St. 57; Hays v. Shannon, 5 Watts 548; Duff v. Wynkoop, 74 Penna. 300; Jermon v. Lyon, 81 Penna. 107. There is no implied warranty on execution sale, either of quality or title. If the judgment debtor has no interest the buyer gets none. Griffith v. Fowler, 18 Vt. 390; Islay v. Stewart, 4 Dev. & B. 163; McGhee v. Ellis, 4 Litt. 244; Champney v. Smith, 15 Gray 512; Walker v. Moody, 65 N. C. 599; Walton v. Reager, 20 Tex. 103; Barrett v. Lockard, 60 Ill. 164; Rodgers v. Smith, 2 Ind. 526; Cameron v. Logan, 8 Iowa 434; Boggs v. Fowler, 16 Cal. 559; Bartholomew v. Warren, 32 Conn. 98; Smith v. Painter, 5 Serg. & R. 223; Freeman v. Caldwell, 10 Watts 9; Staats v. Bristow, 73 N. Y. 284.

(s) Lock v. Sellwood, 1 Q. B. 736.

9. Sales under a satisfied judgment, or a judgment void for want of jurisdiction, are void. Wood v. Colvin, 2 Hill 566; Laval v. Rowley, 17 Ind. 36; State v. Salyers, 19 Ind. 432; Caldwell v. Walters, 18 Penna. 79; Camp v. Wood, 10

Watts 118; Kennedy v. Dunkles, 1 Gray 65; Redmond v. Packenham, 66 Ill. 434. But in Pennsylvania it is held that a purchaser at an execution sale will not be affected by satisfaction of the judgment unless he knew of it. Samms v. Alexander, 3 Yeates 268; Hoffman v. Strohecker, 7 Watts 86; Gibbs v. Neely, 7 Id. 305.

(t) The Gratitude, 3 Rob. Adm. 259; Freeman v. East India Company, 5 B. & A. 621; Vlierboom v. Chapman, 13 M. & W. 239; Underwood v. Robertson, 4 Camp. 138; Cannan v. Meaburn, 1 Bing. 243; Tronson v. Dent, 8 Moo. P. C. 419; Cammell v. Sewell, 3 H. & N. 617, and S. C. in Cam. Seacc, 5 H. & N. 728; 29 L. J., Ex. 350; The Australasian Steam Navigation Company v. Morse, L. R., 4 P. C. 222; Acatos v. Burns, 3 Ex. D. 289, C. A.; The Atlantic Insurance Company v. Huth, 16 Ch. D. 474, 481, C. A.; Maude & Poll. on Shipping (ed. 1881) 580.

10. New England Ins. Co. v. The Sarah Ann, 13 Pet. 387; The Amelia, 6 Wall. 18; Post v. Jones, 19 How. 150; Smith v. Martin, 6 Binn. 262; Myers v. Baymore, 10 Penna. 114; Butler v. Murray, 30 N. Y. 88; Gates v. Thompson, 57 Me. 442.

Factors and consignees.

trusted with, and in possession of, any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be *deemed and taken to be the true owner of the goods so far as to give validity to sales*" made by them to buyers without notice of the fact that such vendors are not owners. By the fourth section of the same act, purchasers from "any agent or agents entrusted with any goods, wares, or merchandise, or to whom the same may be consigned," are protected in their purchases, *notwithstanding notice* that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment. And by the amendment act, 5 and 6 Vict., c. 39, the possession of the goods themselves is treated as having the same effect as that of bills of lading, or "other documents of title;" and a "document of title" is defined to be "any document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented." 11

11. Similar statutes have been passed in many of the states, and in Canada. Pennsylvania, Brightly's Purd. Dig. 664; New York, 3 Rev. Stat. 76; Ohio, Rev. Stat. 1880, § 3216, &c.; Massachusetts, Rev. 1882, 417; Rhode Island, Rev., 1882, 332; Maine, Rev. Stat. 326; Maryland, Rev. Code 291; California, Civ. Code 2369. "Historically, the necessities of trade and the custom of merchants had, in both countries, anticipated the statute." Gould, J., in Cartwright v. Wilmerding, 24 N. Y. 529. The act does not protect a purchaser who knows that the factor in possession is without authority. Stevens v. Wilson, 3 Denio 472. A factor sold and took his own check in part payment. Held, that the owner was bound, the buyer not knowing that the factor was not owner. Traub v. Milliken, 57 Me. 63. In the Pennsylvania act and in most of the statutes already cited, it is expressly provided that a pledgee, with notice that his pledgor is not owner.

or a pledgee for an antecedent debt, takes no interest beyond that of his pledgor. See Macky v. Dillinger, 73 Penna. 85. Galveston cotton factors have no authority except to sell for cash. Kauffman v. Beasley, 54 Tex. 563. At common law, factors cannot pledge goods, and a *bona fide* pledgee, without notice that the factor is not owner, gets no title. Insurance Co. v. Kiger, 13 Otto 352; Gray v. Agnew, 95 Ill. 315; Wright v. Solomon, 19 Cal. 64. The consignee of goods is presumptively the owner. So held in a suit for loss of goods by a consignee against a carrier. McCauley v. Davidson, 13 Minn. 162. Where a factor sold by one entire contract goods of himself and those of his principal—Held, that only the factor could sue for the price. Roosevelt v. Doherty, 129 Mass. 301. A purchaser buying from a factor in the belief that he is owner, may set off a debt due him from the factor to a suit for the price by either factor or

[And by a further amendment act passed in the year 1877 (40 and 41 Vict., c. 39,) the effect of certain decisions which had created hardship is annulled. This act is set out and considered, Book V., Part I., ch. 4, *lien*.

The majority of cases under the factors' acts have turned upon the meaning of the words "*agent entrusted with and in possession*."

The expression varies slightly in the different sections of the acts, but the construction put upon it by the courts has been virtually the same, viz., "*factor or agent entrusted as such and ordinarily having as such factor or agent a power of sale or pledge*;" per Bramwell, B., in *Cole v. North Western Bank*, L. R., 10 C. P. 375; and the definition of Willes, J., in *Heyman v. Flewker*, 13 C. B. (N. S.) 519, at p. 527. The reader is also referred to the judgments of Willes, J., in *Fuentes v. Montis*, L. R., 3 C. P., at p. 275, and of Blackburn, J., in delivering the judgment of the Exchequer Chamber in *Cole v. The North Western Bank*, L. R., 10 C. P., at p. 357, where very full expositions of the law relating to the factor's power of sale and pledge will be found.¹²

§ 20. The following summary of the effect of the decisions upon the words "*agent entrusted with and in possession*" will, it is hoped, be found correct and useful.

The word "*person*," in 6 Geo. IV., c. 94, § 1, must be read as "*agent*," (*Johnson v. Credit Lyonnais Co.*, 3 C. P. D., at p. 45.) The "*agent*" must be an agent in a mercantile transaction, (*Monk v. Whittenbury*, 2 B. & Ad. 484; *Wood v. Rowcliffe*, 6 Hare 183.) A clerk or servant is not such an agent, (*Lamb v. Attenborough*, 1 B. & S. 831; *Jaulerry v. Britten*, 5 Scott 655; S. C., 4 Bing. N. C. 242.)¹³ The agent must have been entrusted for the purpose of sale, (*Monk v. Whittenbury*, *ubi supra*; *Wood v. Rowcliffe*, *ubi supra*), or for some object connected with the sale, (*Baines v. Swainson*, 4 B. & S. 270; *Vickers v. Hertz*, L. R., 2 Sc. App. 113.)¹⁴ If a person carries on

principal. *Merrick's Estate*, 5 W. & S. 9; *Leggett*, 71 N. Y. 387. If the factor who sells without authority, has not the

documentary evidence of title, he must have actual, not merely constructive, possession of the goods to estop the owner. *Covill v. Hill*, 4 Denio 323; S. C., 6 N. Y. 874; *Dows v. Howland v. Woodruff*, 60 N. Y. 73. *Perrin*, 16 N. Y. 325; *First National Bank of Toledo v. Shaw*, 61 N. Y. 283; *But see Loomis v. Simpson*, 13 Iowa *Wooster v. Sherwood*, 25 N. Y. 278; 532. *Hazard v. Fiske*, 18 Hun 277; *Kinsey v.* 14. "The statute pre-supposes that the

two businesses, one that of an agent, such as is contemplated by the act, the other not so, and if he has been entrusted in the latter capacity, he is not an "agent entrusted" within the meaning of the act, (*Monk v. Whittenbury*, *ubi supra*; *Cole v. North Western Bank*, L. R., 9 C. P. 470; *aff. in Ex. Ch.*, 10 C. P. 354.) But if he has been entrusted as agent for sale, although it is an isolated instance of such employment, he is an "agent entrusted" within the act, (*Heyman v. Flewker*, 13 C. B. (N. S.) 519.) To constitute an entrustment with a document of title under 6 Geo. IV., c. 94, it was held that the owner must have intended the agent to be entrusted with the document actually pledged. It was not sufficient that he had entrusted him with some other document of title, by means of which he had obtained possession of the document pledged, (*Close v. Holmes*, 2 Moo. & Rob. 22; *Phillips v. Huth*, 6 M. & W. 572; S. C., in Ex. Ch., *sub nomine Hatfield v. Phillips*, 9 M. & W. 647; and in the House of Lords, 14 M. & W. 665; 12 Cl. & Fin. 343.)¹⁵ But this has now been altered by the definition of entrustment given in 5 and 6 Vict., c. 39, § 4.

A vendor allowed by the purchaser to retain possession of the documents of title to goods was held not to be an agent entrusted under 5 and 6 Vict., c. 39, § 1, (*Johnson v. Credit Lyonnais Co.*, 2 C. P. D. 224; *aff. on appeal*, 3 C. P. D. 32); but this has now been altered by 40 and 41 Vict., c. 39, § 3.¹⁶

relation of principal and factor already subsists when the trust or confidence is reposed. In other words, the relation of factor is not created by the mere possession of the instrument." *Dwight, Com'r in First Nat. Bank of Toledo, v. Shaw*, 61 N. Y. 299. See *Collins v. Ralli*, 20 Hun 246; *affirmed by Ct. of App.*, *Stottenwerck v. Thacher*, 115 Mass. 224; *Mechanics' and Traders' Bank v. Farmers', &c., Bank*, 60 N. Y. 40. Where a factor was entrusted with wheat to be forwarded by a certain vessel to Europe and sold by the factor there, the factor loaded the wheat as his own on another vessel. The owner claiming the wheat from the ship-owner—*Held*, that the ship-owner could hold it for freight and charges, under his contract with the factor by force of the

factor's act. Cal. Civil Code, § 2369; *Green v. Campbell*, 52 Cal. 586, followed, *Hayes v. Campbell*, 55 Cal. 421. And to the same effect, see *Western Trans. Co. v. Marshall*, 4 Abb. (N. Y.) App. Dec. 575.

15. *Hazard v. Fiske*, 18 Hun 277. An agent to buy and ship goods, took the bill of lading in his own name and pledged the shipment for a loan to himself. *Held*, that the pledgee was protected by the law of Louisiana, which controlled the case. *Henry v. Philadelphia Warehouse Co.*, 81 Penna. 76. But see *Ins. Co. v. Kiger*, 13 Otto 352, where the United States Supreme Court held that a pledge by a factor for his own debt of negotiable warehouse receipts for cotton, was void in Louisiana.

16. *Hazard v. Fiske*, 18 Hun 277.

A purchaser obtaining possession of the documents of title to the goods was held not to be an agent entrusted under 5 and 6 Vict., c. 39, § 1, (*Jenkyns v. Osborne*, 7 M. & G. 678; S. C., 8 Scott N. R. 505; *Van Casteel v. Booker*, 2 Ex. 691); but the law has now been altered by 40 and 41 Vict., c. 39, § 4.¹⁷

Again, under 5 and 6 Vict., c. 39, it was held that the agent must have been actually entrusted at the time of the pledge, and if the entrustment had been withdrawn, no matter though secretly and though possession remained, yet the pledgee was not protected, (*Fuentes v. Montis*, L. R., 3 C. P. 268.) But this has now been altered by 40 and 41 Vict., c. 39, § 2.¹⁸

Finally, if the owner really entrusts the agent with the document of title, it is immaterial, so far as the safety of the purchaser or pledgee is concerned, that the entrustment was obtained in consequence of the agent's false and fraudulent representations to the owner, (*Shepard v. Union Bank of London*, 7 H. & N. 661.) But this case must be carefully distinguished from cases where there is no real *entrustment as agent of the owner*, but the *possession* only of the document has been obtained by fraud. In such case the person obtaining possession has no title at all, either as principal or agent, and can convey none to anyone else, (*Kingsford v. Merry*, 11 Ex. 577; 1 H. & N. 503; *Higgon's v. Burton*, 26 L. J., Ex. 342.)¹⁹

17. Where a purchaser obtaining possession of the goods under an agreement, that title shall not pass until payment of the price, sells to a *bona fide* purchaser, such purchaser obtains title under the factor's act. *Bates v. Cunningham*, 12 Hun 21; *Rawls v. Deshler*, 4 Abb. (N. Y.) App. Dec. 12. See *Brundage v. Camp*, 21 Ill. 330; *M. C. R. R. Co. v. Phillips*, 60 Ill. 190; *W. U. R. R. v. Wagner*, 65 Id. 197. But see, *contra*, *Deshon v. Bigelow*, 8 Gray 159; *Hirschorn v. Canney*, 98 Mass. 149; *Benner v. Puffer*, 114 Mass. 376. The leading case in Massachusetts is *Coggill v. Hartford, &c.*, R. R., 3 Gray 545.

18. In *Jones v. Hodgkins*, 61 Me. 480, a buyer from a commission merchant was held protected in his title as against a prior purchaser from the owner without

delivery. But see *Spring v. Coffin*, 10 Mass. 31.

19. Where a purchaser, for cash on delivery, obtained possession without the vendor's knowledge and without payment, and made a sale and delivery—*Held*, that the purchaser obtained no title. *Brower v. Peabody*, 13 N. Y. 121. In *Barker v. Dinsmore*, 72 Penna. 427, wool was obtained by one falsely professing to be agent for the buyer, and sold by him, falsely professing to be agent for the seller. *Held*, that no title passed. In this case the wool had been shipped by rail to the buyer, and the possession obtained by the pretended agent was unauthorized by the seller. *Williams, J.*, said: "The law is well settled that the owner cannot be divested of his property without his consent, unless he has placed

§ 21. These acts apply solely to persons entrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell. (u) 20 The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandise, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire. A purchaser in good faith from such vendors would be liable in trover to the true owner. (x) Mr. Chitty, in his "Treatise on Contracts," (y) has the following passage: "It is said, however, that if the real owner of goods suffer another to have possession thereof, or of those documents which are the *indicia* of property therein, thereby enabling him to hold himself forth to the world as having not the possession only but the property, a sale by such person to a purchaser without notice will bind the true owner, (per Abbott, C. J., *Dyer v. Pearson*, 3 B. & C. 38; per Bayley, J., *Boyson v. Coles*, 6 M. & S. 14.) But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who, from the nature of his employment, might be taken *prima facie* to have had the right to sell." 21 This limitation suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges was approved by the barons of the exchequer in *Higsons v. Burton*, (z) and when thus limited, the principle does

Persons entrusted with possession by owners.

it in the possession or custody of another, and given him an apparent or implied right to dispose of it." See *Dows v. Greene*, 24 N. Y. 638; *Western Transportation Co. v. Marshall*, 4 Abb. (N. Y.) App. Dec. 575.

(u) *Monk v. Wittenbury*, 2 B. & Ad. 484.

20. *Dows v. Nat. Exch. Bank*, 1 Otto 618; *Kusenberg v. Brown*, 42 Penna. 178; *Quinn v. Davis*, 78 Penna. 15; *Ropp v. Palmer*, 3 Watts 178; *Lecky v. McDermott*, 8 Serg. & R. 500; *McMahon v. Sloan*, 12 Penna. 229.

(z) *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomat*, 1 C. B. 672.

(y) Page 362, 11th ed., 1881.

21. This rests on the principle of estoppel. *Nixon v. Brown*, 57 N. H. 34. In *Barnard v. Campbell*, 55 N. Y. 456, Allen, J., said: "Two things must concur to create an estoppel by which an owner may be

deprived of his property by the act of a third person, without his assent, under the rule now considered: first, the owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and second, the person alleging the estoppel must have sold and parted with value on the faith of such apparent ownership. In this respect it does not differ from other estoppels *in pais*." See *Marine Bank v. Fiske*, 71 N. Y. 353; *Weaver v. Barden*, 49 N. Y. 286; *McGoldrick v. Willits*, 52 N. Y. 612; *McNeil v. Tenth National Bank*, 46 N. Y. 345.

(s) 26 L. J., Ex. 342. See, also, *Pickering v. Busk*, 15 East 38; *Cole v. Northwestern Bank*, L. R., 9 C. P. 470; affirmed in Ex. Ch., 10 C. P. 354; and per Cockburn, C. J. in *Johnson v. Credit Lyonnais*, 3 C. P. D. at p. 39.

not differ substantially from the provisions of the factor's act, as amended by the 5 and 6 Vict., c. 39.

§ 22. But the cases decided under the factor's acts leave this statement open to grave doubt, and show the extreme difficulty Law doubtful. of defining the subject matter to which it applies.

In *Heyman v. Flewker*, (a) a picture-dealer was held to be an "agent" entrusted with the goods under the act, whose ordinary business was not to sell pictures, but who was Heyman v. Flewker. authorized to sell the particular pictures in controversy, and instead of so doing pledged them.

In *Baines v. Swainson*, (b) the circumstances were that one Emsley, who carried on business at Leeds as factor and commission merchant, falsely represented to the plaintiffs that he Baines v. Swainson. could sell some of their goods to one Sykes. The plaintiffs thereupon sent to the premises of Emsley the goods, to be by him "perched," or stretched on poles, so that the purchaser could examine them, and then to deliver them. The goods were sent in several successive lots. Emsley sold them to the defendant at a less price than he represented he could get from Sykes. The plaintiffs brought trover, and Martin, B., directed the jury to give them a verdict. The Queen's Bench directed a new trial, Wightman and Crompton, JJ., holding Emsley to be an agent within the meaning of the act, and Blackburn, J., thinking that at all events there was a case for the jury to determine that fact, and also to decide whether the sale had taken place in the ordinary course of business. Crompton and Blackburn, JJ., were of opinion that the agencies referred to by the act are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had previously been held by Vice-Chancellor Wigram, in *Wood v. Rowcliffe*. (c) Crompton, J., said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these acts of parliament the difficulty is immense."

§ 23. In *Fuentes v. Montis*, (d) the court of Common Pleas gave judgment (affirmed in Ex. Ch.) in favor of the plaintiffs, Fuentes v. Montis. wine merchants, in Spain, for certain casks of sherry,

(a) 13 C. B. (N. S.) 519; 32 L. J., C. P. 132.

(b) 4 B. & S. 270; 35 L. J., Q. B. 281.

(c) 6 Hare 183.

(d) L. R., 3 C. P. 268; 37 L. J., C. P. 137; L. R., 4 C. P. 93. See, also, *Shepard v. The Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154.

which they had consigned for sale to a London factor, who had pledged them as security for advances made by the defendant after revocation of the factor's authority, although the defendant was in good faith, and ignorant of the revocation, and although the wine remained in the factor's possession; the court holding that the words "entrusted with and in possession of," must be construed as referring to the time when the factor made the pledge, and that he was no longer "entrusted with" the goods after he had been ordered to deliver them to another factor for account of the consignor, although he had disobeyed the order, and remained "in possession."

Under this decision, which the judges, Willes, Keating, and Smith, expressed regret at being constrained to deliver, the confidence felt by merchants in dealing with factors in relation to goods consigned to them, and in their possession, must be greatly shaken; and there seems certainly to be no mode of *making advances* safely to a factor on the security of goods on consignment, for a merchant or banker in London or Liverpool has no means of finding out whether the foreign consignor has or has not revoked the factor's authority. In this case also Willes, J., expressed his entire concurrence in the following *dictum* of Blackburn, J., reported in *Baines v. Swainson*: "I do not agree with the counsel for the defendant, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an 'entrusting' him as agent; though I think that under that part of § 4 of statute 5 and 6 Vict., c. 39, to which I have referred, the fact of a person being put in possession of goods, calls upon the person who gave him possession to explain and show that it was not an entrusting." It would seem to result from this that a *purchaser*, even from a factor, would get no title to goods if the consignor could show that he had sent them to the factor merely to be kept in storage, or to be forwarded to another place, although the factor was in possession of them with the consent of the consignor and was a person whose ordinary business consisted in selling goods sent to him on consignment.

[The law has now been altered as to secret revocations of entrustment by 40 and 41 Vict., c. 39, § 2.]

Although this case was affirmed in the Ex. Ch., the *dicta* that the act has reference only to factors *for sale* of the goods are disapproved

by Lord Westbury in *Vickers v. Hertz*, (e) so that no one would venture, in the present state of the authorities, to give a positive opinion as to the true construction of this statute. The subject is further discussed *post*, Book V., Part I., ch. IV., on Lien.

SECTION II.—WHO MAY BUY.

§ 24. There are certain classes of persons incompetent to contract in general, but who under special circumstances may make valid purchases. Infants, insane persons, and married women, are usually protected from liability on contracts, as also drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will, combined with that degree of reason and judgment, that can alone enable them to give the *assent* which is necessary to constitute a valid engagement. The exceptions to this general disability, so far as concerns the competency to purchase; will now be considered.²²

§ 25. *Infants*, that is, persons under the age of twenty-one years, are protected by law from liability on purchases made by them, unless for *necessaries*. Infants.

(e) L. R., 2 Sc. App. 113, 118; but see remarks of Blackburn, J., in *Cole v. North Western Bank*, L. R., 10 C. P., at p. 374, where he shows that Willes, J., in *Fuentes v. Montis*, L. R., 3 C. P., at p. 284, did not express an opinion that the act only applied to factors for *future sale*. Mr. Justice Willes says expressly in that case, at p. 279, "I do not mean to limit the operation of the statute to agents entrusted with goods for future sale, either generally or in the particular instance;" and he then goes on to refer, with approval, to *Baines v. Swainson*, 4 B. & S. 270, the facts in which bear a striking resemblance to those in *Vickers v. Hertz*.

22. Trustees cannot buy at a sale of the property of their *cestuis que trust*. This principle has a wide sweep. "No person can become a purchaser of an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser." *Davoue v. Fanning*, 2 Johns. Ch. 252. "The rule restrains all

agents, public and private." "It embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual interest." *Michoud v. Girod*, 4 How. (U. S.) 555, 559. "The operation of the prohibition [to purchase] is not confined to those who are personally active in effecting a sale. It extends to all upon whom the act of a party or of the law casts a fiduciary relation to the subject of the trust, and which they are not permitted to shake off at pleasure." *Beeson v. Beeson*, 9 Barr 279, 284. Accordingly, the prohibition to purchase extends to agents, guardians, executors, administrators, attorneys, sheriffs and assignees, directors and officers of a corporation. See 1 *White & T. Lead. Cas. in Eq.* (Am. ed. 1876) 62, 238; 2 *Id.* 1228.

The purchase by an infant, however, is not absolutely void, but only voidable in his favor. (*f*) He may maintain an action (*g*) against the vendor during infancy, and he may, on arriving at the age of twenty-one years, confirm his purchase. (*h*)²³ An action at law will not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him; (*i*) nor would these facts constitute at law a good replication to a plea of infancy; (*k*) nor suffice as the basis of a replication on equitable grounds. (*l*) But they would entitle the plaintiff to relief if made the subject of a bill in equity. (*m*)²⁴

(*f*) *Gibbs v. Merrell*, 3 Taunt. 307; S. C., 1 Kel. 913.

Hunt v. Massey, 5 B. & Ad. 902; *Holt v. Clarencieux*, 2 Str. 988; *Zouch v. Parsons*, 3 Burr. 1194; per Abbott, C. J., in *The King v. Inhabitants of Chillesford*, 4 B. & C. at p. 100.

(*g*) *Warwick v. Bruce*, 2 M. & S. 205.

(*h*) Bac. Abr., *Infancy*, (I) 3; *Holt v. Ward*, Stra. 939.

23. In *Tucker v. Moreland*, 10 Pet. 58, 71, Story, J., said: "The result of the American decisions has been correctly stated by Mr. Chancellor Kent in his learned Commentaries to be that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election when they become of age, either to affirm or disallow them." See *Irvin v. Irvin*, 9 Wall. 617; 1 Am. Lead. Cas. 280 (ed. of 1871.) But the appointment of an agent or attorney by an infant is void, and he will not be bound by the acts of such agent or attorney. *Armistage v. Widoe*, 36 Mich. 124; *Ware v. Cartledge*, 24 Ala. 622; *Knox v. Flack*, 22 Penna. 337; *Pickler v. The State*, 18 Ind. 266; *Maples v. Hastings*, 3 Harr. (Del.) 403; *Fetrow v. Wiseman*, 40 Ind. 148, 155. If the infant avoids a purchase made by him, he must avoid the whole of it, and return the property purchased, if he yet retains it. *Riley v. Mallery*, 33 Conn. 201; *Price v. Furman*, 27 Vt. 208.

(*i*) *Price v. Hewett*, 8 Ex. 146; *Johnson v. Pye*, 1 Sid. 258; S. C., 1 Jev. 169.

(*k*) *Johnson v. Pye*, *at supra*.

(*l*) *Bartlett v. Wells*, 31 L. J., Q. B. 57.

(*m*) Ex parte Unity Joint Stock Banking Association, 27 L. J., Bank. 33; *Nelson v. Stocker*, 28 L. J., Ch. 760.

24. *Studwell v. Shapter*, 54 N. Y. 249; *Stoolfoos v. Jenkins*, 12 Serg. & R. 399; *Heath v. Mahoney*, 7 Hun 100; *Merriman v. Cunningham*, 11 Cush. 40; *Conrad v. Lane*, 26 Minn. 389; *Whitcomb v. Joslyn*, 51 Vt. 79; *Burley v. Russell*, 10 N. H. 184. Where an infant buyer of goods represented that he was of age, and afterwards avoided the sale on the ground of his infancy—*Held*, that the seller could reclaim the goods by replevin suit. *Badger v. Phinney*, 15 Mass. 359. Also held that an action on the case for deceit will lie against an infant for falsely representing himself of age, and thereby obtaining goods on credit. *Hughes v. Gallans*, 10 Phil. (Pa.) 618. And see *Nolan v. Jones*, 53 Iowa 387. But in *Curtin v. Patton*, 11 Serg. & R. 310, *Duncan, J.*, said: "The law has very wisely protected infants against their liability on contracts, except for necessities, and if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there is an end of the protection. *Johnson v. Pye*, 1 Sid. 258. Lord C. J. Keeling expressed great indignation at the attempt to charge an infant in tort for that which was the

§ 26. But an infant is competent to purchase for cash or on credit a supply of *necessaries*; and his purchase on credit will be valid even though it be shown that he had an income ^{Necessaries.} at the time, sufficient to supply him with ready money to buy necessities suitable to his condition. (n) 25

The necessities for which the infant may make a valid contract of purchase are stated in Co. Litt. 172, to be "his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But these are not the only articles that are comprehended by the term. It includes also articles purchased for *real use*, although ornamental, as distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one; (o) and it was said by Alderson, B., in delivering the judgment of the court in *Chapple v. Cooper*, (p) after advisement that "articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. * * * In all cases there must be *personal* advantage from the contract derived to the *infant himself*." The word necessities must therefore be regarded as a relative term, to be construed with reference to the infant's age, state, and degree. (q) 26

foundation of an action of *assumpsit*, and said: 'We will stay the judgment forever, else the whole foundation of the common law will be at stake.'

(n) *Burghart v. Hall*, 4 M. & W. 727; *Peters v. Fleming*, 6 M. & W. 42.

25. An infant will be liable for necessities purchased, though no express bargain was made. *Gay v. Ballou*, 4 Wend. 403; *Sands v. Stockton*, 14 B. Mon. 232. If an express bargain has been made, it will not bind the infant. The court will ascertain what is the fair price and allow it. *Morton v. Steward*, 5 Ill. App. 533; *Stone v. Dennison*, 13 Pick. 7; *Earle v. Reed*, 10 Metc. 387. It may be suggested, however, that in no case would the law permit the seller to recover from the infant more than the agreed price, the contract being voidable for the benefit of the infant only. An over-supply of necessities cannot give a right of action. *Johnson v. Lines*, 6 W. & S. 80.

In *Rivers v. Gregg*, 5 Rich. Eq. 274, it was held that ordinarily an infant having a sufficient income is not liable for necessities supplied on credit.

(o) *Peters v. Fleming*, 6 M. & W. 42.

(p) 18 M. & W. 256. See, also, per *Bramwell, B.*, in *Ryder v. Wombwell*, L. R., 3 Ex. 90; 37 L. J., Ex. 47.

(q) 2 Stephen Com. 307 (ed. 1874.)

26 These necessities are not a certain class of articles known by that name, but articles in fact necessary to the infant purchasing. They vary according to the means, age and situation of the infant. An infant supported by his parent or guardian cannot bind himself for necessities. *Hoyt v. Casey*, 114 Mass. 397; *McKanna v. Merry*, 61 Ill. 177. Where the minor resides with his parents, it is presumed that he is properly supplied with necessities in the absence of proof to the contrary. *Hoyt v. Casey*, 114 Mass. 397; *Perrin v. Wilson*, 10 Mo. 451.

The cases in which these principles have been applied are quite too numerous to be reviewed in detail, but some examples may be selected, before considering the question whether it is for the court or jury to determine in each case what are or are not necessities for the infant.

Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms, fruit, confectionery, &c., &c., were held not necessities by the Queen's Bench in *Wharton v. McKenzie*, (r) and the Exchequer of Pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be nonsuited. (s)

But where a jury had found that a purchase for the amount of £8 0s. 6d. for gold rings, a watch chain, and a pair of breastpins, were "necessaries" for an undergraduate at Cambridge, the son of a gentleman of fortune and a member of parliament, the Exchequer refused to set aside the verdict, holding the question to be one for the jury. (t) Where the defendant, a captain in the army, had ordered livery for his servant and cockades for some of his soldiers, the jury found both to be necessities; but the court, on motion for new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessities, Lord Kenyon observing, that as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and if so, the livery was necessary. (u) In perilous times, Lord Ellenborough held that regimentals sold to an infant as a member of a volunteer corps enrolled for the national defence, were necessities. (x) But a chronometer, costing £68, was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the royal navy. (y)

In *McKanna v. Merry*, 61 Ill. 179, necessities are defined as follows: "The articles furnished or money advanced must be actually necessary, in the particular case, for use, not mere ornament, for substantial good, not mere pleasure, and must belong to the class which the law generally pronounces necessary for infants." Goods to carry on trade with, held, not necessary. *Mason v. Wright*, 13 Met. 306. Supplies for farming, held not necessities. *Decell v. Lewenthal*, 57 Miss. 331. But see *Mohney v. Evans*, 51 Penna. 80, where it was left to the jury

to decide whether a purchase of cattle by a minor to carry on his farm work was to be considered necessary. Ordinarily houses are not necessities. *Smith v. Peters*, 10 B. Mon. 259; *Beeler v. Young*, 1 Bibb 519; *Merriam v. Cunningham*, 11 Cush. 40.

(r) 5 Q. B. 606.

(s) *Brooker v. Scott*, 11 M. & W. 67.

(t) *Peters v. Fleming*, 6 M. & W. 42.

(u) *Hands v. Slaney*, 8 T. R. 578.

(x) *Coates v. Wilson*, 5 Esp. 152.

(y) *Berolles v. Ramsay*, Holt N. P.

77.

A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician to ride for exercise; (z) but a purchase of cigars and tobacco by an infant was held not to bind him; (a) nor was the plaintiff allowed to recover the cost of a silver goblet sold to an infant for £15 15s., which the plaintiff knew when he supplied it to be intended by the infant for a present to a friend. (b)

§ 27. In the case of *Ryder v. Wombwell* (c) it was finally settled, that the issue whether goods sold to an infant are necessities is a question of fact to be left to the jury; but that in this, as in all other like questions, the modern rule is, not as formerly that a case must go to the jury if there be a scintilla of evidence, but that the judge is to determine (subject of course to review), whether there is evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established.²⁷ The facts were that the defendant, the son of a deceased baronet, was in the enjoyment in his own right of an allowance of £500 a year, during his minority, and entitled to £20,000 on coming of age. He had no fixed residence, but lived, when in London, with his mother, and when in the country, with his eldest brother, free of charge. The plaintiff sought to recover from him the following sums: 1st, £25 for a pair of solitaires, or sleeve buttons, with rubies and diamonds; 2d, £6 10s. for a smelling bottle, ornamented with precious stones; 3d, £15 15s. for an antique silver goblet, with an inscription; 4th, £13 13s. for a pair of coral earrings. The goblet was wanted, as the

Question of
law or fact.
Ryder v.
Wombwell.

(z) *Hart v. Prater*, 1 Jur. 623.

(a) *Bryant v. Richardson*, 14 L. T. (N. S.) 24; L. R., 3 Ex. 93, in note.

(b) *Ryder v. Wombwell*, L. R., 3 Ex. 90; in *Cam. Scaoc.*, 4 Ex. 32.

(c) L. R., 3 Ex. 90; 4 Ex. 32.

27. In *Bundell v. Keeler*, 7 Watts 237, *Huston, J.*, said: "We do not mean to give up the restraints which the law puts on those who furnish infants with the means of extravagance, of disorderly or intemperate life, nor even to concede that in all cases the jury are the sole judges of what is necessary and proper. The court ought to have a superintending power, and in gross cases set aside a ver-

dict. But many cases are composed of so many circumstances of which the jury are the proper judges, as that they must be submitted to them." Approved, *Mohney v. Evans*, 51 Penna. 80, 83. But the following seems to be the true principle:

It is a question of law for the court to determine whether the articles are in the class of necessities, and then for the jury to determine whether in this particular case they were required by the infant. *Merriam v. Cunningham*, 11 Cush. 40; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Id. 512; *McKanna v. Merry*, 61 Ill. 178; *Jordan v. Coffield*, 70 N. C. 110.

plaintiff was told by the defendant, for a present to a friend, at whose house the defendant had been frequently a guest. Kelly, C. B., rejected evidence offered by the defendant to show that at the time of the purchase of the solitaires, the infant had already purchased articles of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned chief baron refused to nonsuit, but left it to the jury to say whether all or any of the articles were necessaries, suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessaries, the other articles not. Leave was reserved to move for a nonsuit, or for reduction of damages, if the court should be of opinion that there was evidence for the jury that one of the two articles was necessary, and not the other. Bramwell, B., was of opinion that the plaintiff ought to have been nonsuited, or a verdict given for the defendant; and that the evidence to show that the defendant was already supplied with similar articles, ought to have been received. Kelly, C. B., delivered the judgment, holding,—first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs*, if he desired it, for the price of the solitaires. On the appeal it was held unanimously that the plaintiff ought to have been non-suited. In the opinion delivered by Willes, J., he made the following important preliminary observations: “We must first observe that the question in such cases is not whether the expenditure is one which an infant in the defendant’s position could not properly incur. There is no doubt that an infant may buy jewelry or plate if he has the money to pay, and pays for it; but the question is, *whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries.*” In reference to this question the court held that judges know as well as juries what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things; that if the state of things be unusual, new, or exceptional, then a question of fact arises to be decided by a jury under proper direction: *that the judge must determine whether the case is such as to cast on the vendor the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence*

to satisfy that onus. In the application of these principles to the case before it, the court held that it was not bound to consider itself so ignorant of every usage of mankind, as to be compelled, in the absence of all evidence on the subject, to take the opinion of a jury whether it is so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without them.

On the point as to the exclusion of the evidence on the trial, the Court of Error expressly refused to decide, reserving it "to be determined hereafter."

§ 28. If an infant be married, his obligations as husband and father in supplying necessities are the same as if he were of full age, and the things necessary for his wife and children ^{Married infant.} are necessary for himself, and what is supplied to them on his express or implied credit is considered as purchased by him. (d) An illustration of the maxim, "*Persona conjuncta æquiparatur interesse proprio*," is given in Broom's Maxims in these terms:—"So if a man under the age of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition." 28

§ 29. An infant being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessities, ^{Infant tradesman.} whether he be trading alone or in partnership with another. (e) But if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable for what is so used. (f) 29

In Thornton v. Illingworth, (g) a purchase of goods by an infant for the purposes of trade was treated by the Queen's Bench as constituting an exception to the general rule ^{Thornton v. Illingworth.} that the contracts of infants are voidable only, not void. Bayley, J., said: "In the case of an infant, a contract made for goods, for the

(d) Turner v. Frisby, 1 Str. 168; Rainsford v. Fenwick, Carter 215.

28. Necessaries for an infant's wife and children are necessities for which he is liable. Abell v. Warren, 4 Vt. 149, 152; Beeler v. Young, 1 Bibb 519; Cantine v. Phillips, 5 Harring. 428.

(e) Whywall v. Champion, Stra. 1083; Dilk v. Keighley, 2 Esp. 480.

(f) Tuberville v. Whitehouse, 1 C. & P. 94.

29. Mason v. Wright, 13 Metc. 306; Decell v. Loewenthal, 57 Miss. 331. But see Mohny v. Evans, 51 Penna. 80; Price v. Sanders, 60 Ind. 310.

(g) 2 B. & C. 834. See, also, Belton v. Hodges, 9 Bing. 865.

purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts." Littledale, J., concurred in this view.

But in the previous case of *Warwick v. Bruce*, (h) (not cited in *Thornton v. Illingworth*), where the infant was plaintiff by his next friend, it appeared that the infant had paid £40, part of the total price of £87 10s., which he had agreed to give for a quantity of potatoes, and Lord Ellenborough non-suited the plaintiff on the objection that the contract was a trading contract. A new trial was granted, Lord Ellenborough saying: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do."

This case is not reconcilable with the *dicta* of the judge in *Thornton v. Illingworth*, for it is plain that if a contract is *absolutely void*, no action can be maintained on it or for the breach of it by anybody. The facts and circumstances of the two cases are widely dissimilar, and the *decision* in the earlier case seems to be more in accordance with general principles than the *reasoning* in the later case. The language of the learned judges in *Thornton v. Illingworth* was wider than was required for the decision of the case before them, and another proposition contained in the same opinion has been overruled, as shown by Lord Denman in *Bateman v. Pinder*, (i) decided in 1842.

[The infants' relief act, 1874, *post*, applies to the trading contracts of an infant; and an infant trader cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for the purposes of trade. (k)]

(h) 2 M. & S. 205.

(i) 3 Q. B. 574.

(k) *Ex parte Jones*, 18 Ch. D. 109, C. 459; and see *Reg. v. Wilson*, 5 Q. B. D. A., overruling *Ex parte Lynch*, 2 Ch. D. 28, C. C. R.

227; and a decision to the same effect in Ireland, in *In re Rainys*, 3 Ir. L. R., Ch.

§ 30. The infant may, on arriving at the age of twenty-one years, ratify and confirm a purchase made during infancy, but only in writing. By the 9 Geo. IV., c. 14, § 5, (usually called Lord Tenterden's act), it is provided, "that no action shall be maintained whereby to charge any person upon any *promise made after full age*, to pay any debt contracted during infancy, or upon *ratification after full age*, of any *promise or simple contract made during infancy*, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." 30

Ratification
after ma-
jority.

[Law now
altered since
1874.]

The legal interpretation of the words (also used in the statute of frauds), "some writing signed by the party to be charged therewith," is treated of in Part II., ch. VI., of this book. On the question of the sufficiency of the words used in the written promise to satisfy the requirement of the statute, Rolfe, B., in delivering the judgment of the Exchequer of Pleas in *Harris v. Wall*, (l) held, that the act distinguished between a *new promise* and a *ratification*: and in the case before the court, the defendant was held liable on the letters written by him, as amounting to a ratification, though not a new promise. And the test of a ratification was given in these words: "Any written instrument which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification." In the report of that case, the reader will find all the previous cases cited and reviewed in the arguments of the counsel. (m)

30. In some of the states (Maine, New Jersey, Kentucky, and perhaps others,) similar statutes have been passed; in most a parol ratification is still sufficient. There must be an acknowledgment of liability and an express promise to pay, to ratify an executory contract made by the infant, with knowledge that he is liable. *Turner v. Gaither*, 83 N. C. 357; *Fetrow v. Wiseman*, 40 Ind. 148; *Curtin v. Palton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Barr 428. But see *King v. Jamison*, 66 Mo. 424, and *Morse v. Wheeler*, 4 Allen 570, that when one comes of age he must be presumed to know the law, and therefore to know that he is not liable on his contracts made in

infancy. Any exercise of ownership of a chattel after coming of age ratifies the purchase of it. *Robinson v. Hoskins*, 14 Bush 393; *Boody v. McKenney*, 23 Me. 525; *Cheshire v. Barrett*, 4 McCord 241; *Minock v. Shortbridge*, 21 Mich. 318; *Walsh v. Powers*, 43 N. Y. 23.

(l) 1 Ex. 122.

(m) *Hartley v. Wharton*, 11 Ad. & E. 934; *Hunt v. Massey*, 5 B. & Ad. 902; *Lobb v. Stanley*, 5 Q. B. 574; *Williams v. Moor*, 11 M. & W. 256; *Cohen v. Armstrong*, 1 M. & S. 724; *Tanner v. Smart*, 6 B. & C. 603; *Whipsey v. Hillary*, 3 B. & Ad. 399; *Routledge v. Ramsay*, 8 Ad. & E. 221.

But the writing must do more than merely acknowledge the correctness of an account as set forth, and the satisfaction of the party with the prices charged. It must further contain something to recognize the contract as an *existing liability*, in order to constitute a ratification. On this principle the Queen's Bench in *Rowe v. Hopwood* (n) held insufficient to bind the defendant his signature to a writing at the foot of the account in these words: "Particulars of account to end of year 1867, amounting to £162 11s. 6d., I certify to be correct and satisfactory." Nothing in the words indicated the intention to pay the account, or to admit it as an existing liability.

§ 31. [Previously to the year 1874 an infant might, on arriving at the age of twenty-one years, ratify and confirm a purchase made during infancy, the reason being that such contract was voidable, not void.

The ratification must, under 9 Geo. IV., c. 14, § 5, (usually called Lord Tenterden's act), have been in writing. But that section has been repealed by the statute law revision act, 1875, (38 and 39 Vict., c. 66.)

And now, by the infants' relief act, 1874, (37 and 38 Vict., c. 62,) it is provided by section 1 as follows: "All contracts Infants' relief act, 1874. whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, (other than contracts for necessities,) and all accounts stated with infants, shall be *absolutely void*; provided, always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

And by section 2 it is provided as follows: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The second section has been held to apply to a ratification after the passing of the act of a contract made during infancy before it. (o) It would probably also be held that a ratification could not be used

(n) L. R., 4 Q. B. 1.

(o) Ex parte Kibble, In re Onslow, 10 Ch. 373.

as a set-off. (p) The *ratio decidendi* of *Rawley v. Rawley*, which was decided under 9 Geo. IV., c. 14, § 5, was that a set-off under the statutes of set-off must be of an actionable debt; and that the debt in that case, not having been ratified in writing so as to comply with the provisions of the statute, and therefore, not being actionable, could not be used by way of set-off.

Mr. Pollock points out in his work on Contracts, 3d ed., at p. 62, that the expression contracts "for goods supplied or to be supplied" is not free from obscurity. Had the words been instead "*for payment for goods supplied, &c.*," the meaning would have been clear. No cases relating to sales and purchases of goods (g) appear to have been as yet decided under the act, but, from a consideration of its language, the effect of the act with reference to this class of contracts seems to be as follows:

When the infant is *the purchaser* (except where he contracts for the purchase of necessaries) by the first section the contract is absolutely void; it therefore follows that the second ^{Infant purchaser.} section is superfluous.

When the infant is *the seller* the first section seems to have no application, and the legal effect of the contract remains the same as it was at common law before the act, *i. e.*, it is ^{Infant seller.} voidable at the infant's option, and he may adopt and enforce it upon attaining his majority, or even before. (r) But the second section, where the words "*No action shall be brought* whereby to charge any person, &c.," are to be observed, will have the effect of protecting the infant seller against an action by the purchaser, although the infant may have ratified the contract after reaching full age.] ³¹

(p) *Rawley v. Rawley*, 1 Q. B. D. 460, C. A.

(g) Cf. *Coxhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410; all cases of breach of promise of marriage.

(r) *Warwick v. Bruce*, 2 M. & S. 205.

31. Sales by an Infant.—No such statute is in force in any of the states. An infant may avoid his sales as well as his purchases. His contracts of sale are absolutely void unless he makes actual delivery of the chattel sold, in which

case they are voidable, either before or after he arrives at his majority. *Stafford v. Roof*, 6 Cowen 626, is the leading case. *Chapin v. Shafer*, 49 N. Y. 407; *Cogley v. Cushman*, 16 Minn. 401; *Miller v. Smith*, 26 Minn. 248. On avoidance he may recover the chattel sold, but on condition that he restore the consideration received if in his power; if not, he may still recover. *Price v. Furman*, 27 Vt. 268; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Id. 210; *Chandler v. Simmons*, 97 Mass. 508; *Betts v. Carroll*, 6 Mo. App. 518.

§ 32. As to *lunatics* and persons *non compos mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which govern such contracts when made by infants. There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase his mind was so deranged that he did not know nor understand what he was doing. Still, if that state of mind, though really existent, be unknown to the other party, and no advantage be taken of the lunatic, the defence cannot prevail; especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position. In the case cited in the note, all the authorities will be found quoted and examined. (s)

So far as relates to supplies of necessities to a person of unsound mind, there can be no question that where no advantage is taken of his condition by the vendor, the purchase will be held valid. (t) 32

* § 33. A *drunkard*, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract in general, (u) but he would be liable for absolute necessities supplied to him while in that condition; and Pollock, C. B., put the ground of the liability as follows: "A contract may be implied by law in many cases, even where the party protested against any contract. The law says he did contract, because he ought to have done so. On that ground the creditor might recover against him when sober, for necessities supplied to him when drunk." (x)

(s) *Molton v. Camroux*, 2 Ex. 487; and in error, 4 Ex. 17. See, also, *Niell v. Morley*, 9 Ves. 478; *Beavan v. M'Donnell*, 9 Ex. 309.

(t) *Marby v. Scott*, 1 Sid. 112; *Lane v. Kirkwall*, 8 C. & P. 679; *Wentworth v. Tubb*, 1 Y. & C. N. C. 171; *Nelson v. Duncombe*, 9 Beav. 211; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

32. An executed sale of goods, before inquest as to sanity, to a lunatic, cannot be avoided, unless fraud or knowledge of the insanity is shown. *Beals v. See*, 10 Penna. 56; *Lancaster County Bank v. Moore*, 78 Id. 407; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggs v. Ameri-*

can Tract Soc., 84 N. Y. 330; *McCormick v. Littler*, 85 Ill. 62; *Matthiessen v. McMahon*, 38 N. J. L. 536. Contracts with lunatics for necessities or things suitable to their condition in life, if fair, will be sustained. *Richardson v. Strong*, 13 Ired. 106; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Van Horn v. Hann*, 39 N. J. L. 207.

(u) *Molton v. Camroux*, 4 Ex. 17; *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Gore v. Gibson*, 13 M. & W. 623; *Cook v. Clayworth*, 18 Ves., Jr., 12.

(x) *Gore v. Gibson*, 13 M. & W. 623.

[But a contract entered into by a person who is so drunk, as not to know what he is doing, is *voidable* only and not void, and may therefore be ratified by him when he becomes sober. (y)]³³

Contract
voidable.

§ 34. A *married woman* is absolutely incompetent to enter into contracts during coverture, and has in contemplation of law no separate existence, her husband and herself forming but one person. (z)³⁴ She cannot even, while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase on her own account, even for necessities, and when credit is given to her there is no remedy but an appeal to her honor. (a) The contract with her is not, as in the case of an infant, voidable only, but it is absolutely void, and therefore incapable of ratification after her coverture has ceased. (b)³⁵

Married
women.

1. At com-
mon law.

§ 35. The common law exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser are well defined. The first is, when the husband is *civilitur mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment. (c) The disability of the wife in such cases is said to be suspended, for her own benefit, that she may be able to procure a subsistence. She may

When hus-
band is
civilitur
mortuus.

(y) *Matthews v. Baxter*, L. R., 8 Ex. 132, where the use of the word "void" in *Gore v. Gibson* is commented on.

33. *French v. French*, 8 Ohio 214; *Van Wyck v. Brasher*, 81 N. Y. 260; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Foss v. Hildreth*, 10 Allen 76, 79. An inquisition finding a man an habitual drunkard is *prima facie*, but not conclusive evidence of incapacity to contract. *Noel v. Karper*, 53 Penna. 97; *Klohs v. Klohs*, 61 Id. 245.

(z) *Co. Littleton* 112 d.

34. *Young v. Paul*, 10 N. J. Eq. 401; *Dorrance v. Scott*, 3 Whart. 309; *Jacob v. Featherstone*, 6 Watts & S. 346; *Stephenson v. Osborne*, 41 Miss. 119; *Johnston v. Jones*, 12 B. Mon. 376.

(a) *Marshall v. Rutton*, 8 T. R. 545.

(b) *Zouch v. Parsons*, 3 Burr. 1794, 1805; *Com. Dig.* Baron and Feme (W.)

35. *Walker v. Simpson*, 7 Watts & S. 83; *Blake v. Hall*, 57 N. H. 373; *Eaton v. George*, 40 N. H. 258; *Howe v. Wilders*, 34 Me. 566; *Pond v. Carpenter*, 12 Minn. 430; *Pippen v. Wesson*, 74 N. C. 442; *Mallett v. Parham*, 52 Miss. 922. But a married woman may purchase necessities on the credit of her husband, if he neglect to provide them; but not if he provides them. *Jolly v. Rees*, 15 C. B. 628. Followed by House of Lords in *Debenham v. Mellon*, L. R., 5 Q. B. D. 394; *Eames v. Sweetser*, 101 Mass. 78; *Hultz v. Gibbs*, 66 Penna. 360; *Rea v. Durkee*, 25 Ill. 503; *Clark v. Cox*, 32 Mich. 204; *Seaton v. Benedict*, 2 Sm. Lead. Cas. 439.

(c) *Ex parte Franks*, 7 Bing. 762; *Sparrow v. Caruthers*, cited in n., 1 T. R., p. 6; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

therefore bind herself as purchaser when her husband, a convict sentenced to transportation, has not yet been sent away, (d) and also when he remains away after his sentence has expired. (e) But not if he abscond and go abroad in order to avoid a charge of felony. (f) ³⁶

It was held in some early cases that where a woman's husband was an alien, and resided abroad, and she lived in England, and contracted debts here, she was liable; Lord Kenyon, in one case, putting the decision "on the principle of the old common law, where the husband had adjured the realm." (g) But this principle was held not to apply to the case of Englishmen who voluntarily abandoned the country. (h) ³⁷ More modern cases seem to throw very strong doubt on the earlier doctrine as regards the capacity of a woman, whose husband is an alien, residing abroad, to contract debts for which she can be sued in England. In *Kay v. Duchesse de Pienne*, where Lord Ellenborough's ruling at Nisi Prius was confirmed by the court in banco (3 Camp. 123), his Lordship confined the doctrine of Lord Kenyon to cases where the husband *has never been in the kingdom*, not simply residing abroad separate from his wife. And in *Boggett v. Frier*, 11 East 303, the court observed to counsel, that all these old cases were, so far as opposed to *Marshall v. Rutton*, 8 T. R. 545, overruled by that case. In *Barden v. Keverberg*, where the defendant pleaded coverture, plaintiff replied that defendant's husband was an alien residing abroad, and had never been within the

(d) *Ex parte Franks*, 7 Bing. 762.

(e) *Carroll v. Blencow*, 4 Esp. 27.

(f) *Williamson v. Dawes*, 9 Bing. 292.

36. *Gregory v. Paul*, 15 Mass. 31; *Rhea v. Rhenner*, 1 Pet. 105, 108; *Smith v. Silence*, 4 Iowa 321.

(g) *Walford v. Duchesse de Pienne*, 2 Esp. 553; *Franks v. De Pienne*, 2 Esp. 587; *Burfield v. De Pienne*, 2 B. & P., N. R. 380; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

(h) *Farrar v. Countess of Granard*, 1 B. & P. N. R. 80; *Marsh v. Hutchinson*, 2 B. & P. 226; *Williamson v. Dawes*, 9 Bing. 292.

37. **Effect of Abandonment.**—The American cases follow the older English authorities and hold that abandonment by the husband enables the wife to con-

tract while the desertion lasts. In *Rhea v. Rhenner*, 1 Pet. 107; Justice Duval said: "The law seems to be settled that when the wife is left without maintenance or support by the husband, has traded as a *feme sole* and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned his wife." *Gregory v. Paul*, 15 Mass. 31; *Rose v. Bates*, 12 Mo. 47; *Love v. Moynihan*, 16 Ill. 277; *Hazebaker v. Goodfellow*, 64 Ill. 238, (statute); *Ahern v. Easterby*, 42 Conn. 546; *Lawrence v. Spear*, 17 Cal. 421; *Tobin v. Galvin*, 49 Id. 34; *Osborn v. Nelson*, 59 Barb. 375; *Wilson v. Brown*, 18 N. J. Eq. 277; *Frary v. Booth*, 37 Vt. 78.

United Kingdom; and that the debt was contracted by the defendant in England, where she was living separate and apart from her husband, as a *feme sole*, and that the plaintiff gave credit to her as a *feme sole*; and that she made the promise in the declaration mentioned as a *feme sole*. There was no demurrer, but the case was tried on the facts alleged by the replication, and denied by rejoinder, and the verdict for plaintiff was set aside by the court in banco. Parke, B., said:—"Supposing the replication good, *although I have a strong opinion that it is not* (because the cases in which the wife has been held liable, her husband being abroad, apply only where he is *civilter mortuus*), you are bound under it, to make out that the husband was an alien, that he was resident abroad, and never in this country, which facts are now admitted—and *also* that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her to be a *feme sole*;" and the same learned judge threw doubt upon the report of what Lord Ellenborough said in *Kay v. Duchesse de Piennes*. (i)

More recently the case of *De Wahl v. Braune* (k) came before the Exchequer. The declaration was on an agreement to purchase the interest of the plaintiff in the benefit of a lease ^{De Wahl v. Braune.} and school for young ladies. Plea in abatement, plaintiff's coverture. Replication, that her husband was an alien, born in Russia, did not reside in this country at the commencement of the action, was never a subject of this country; that the cause of action accrued to plaintiff in England, while she was a subject of our lady the queen, residing here separate and apart from her husband; that defendant became liable to her as a single woman, and that before and at the time of the commencement of the suit war existed between Russia and this country, and that her husband resided in Russia, and adhered to the said enemies of our lady the queen. On demurrer, held that the wife could not sue as a *feme sole*; that her husband was not *civilter mortuus*, and that the contract made during coverture was the husband's. In this case the action was by the wife, but the reasoning of the court would have been equally applicable if her condition had been reversed, and she had been the defendant instead of the plaintiff.

The only remaining exception to the absolute incapacity of a mar-

(i) *Barden v. Keverberg*, 2 M. & W. 61. (k) 1 H. & N. 178, and 25 L. J., Ex. 343.

Married
woman sole
trader in city
of London.

ried woman to bind herself as purchaser during coverture, is one which arises under the custom of London, and is confined to the city of London. By that custom, a *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the city courts, in all matters arising out of her dealings in her trade in London. In the well-known case of *Beard v. Webb*, (l)

Beard v.
Webb.

where Lord Eldon, C. J., delivered the judgment of Cam. Scacc., reversing that of the King's Bench, this custom is elaborately considered, in connection with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft." 38

§ 36. But recent legislation has made considerable changes in these rules of the common law. By the 20 and 21 Vict., c. 85, § 21, a wife "deserted by her husband" may obtain an order to protect her earnings and property, the effect of which order during its continuance is to place her "in the like position in all respects with regard to property and contracts as she would be under this act if she obtained a decree of judicial separation." And the effect of such a decree is stated by the twenty-sixth section to be that "the wife shall, while so separated, be considered as a *feme sole for the purposes of contract*, and wrongs and injuries, and *suing and being sued* in any civil proceeding." (m) Further provision is made by the 21 and 22 Vict., c. 108, §§ 8, 9, 10, for the protection of persons dealing with wives who have obtained the order above described.

Married
woman;
2. By statute.

Protection
order.

By 33 and 34 Vict., c. 93, (married women's property act, 1870,) [amended by 37 and 38 Vict., c. 50, (married women's property act amendment act, 1874,)] the rights of married women to acquire property are greatly extended, and by the first section [of 33 and 34 Vict., c. 93,] especially, her "wages

Property
acts, 1870 and
1874.

(l) 2 B. & P. 93; see, also, *Macq. Husband and Wife* 361 (ed. 1872), where this custom is set out at length.

38. This system was recognized as in force in South Carolina, restricted, however, as to trade and commerce. *Mo-Daniel v. Cornwell*, 1 Hill 428; *Hobart v.*

Lemon, 3 Rich. 131; *Blythwood v. Everingham*, 3 Rich. 235. In Pennsylvania a similar custom was sanctioned by statute as far back as 1718. See *Cleaver v. Scheetz*, 70 Penna. 496.

(m) See *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

and earnings acquired or gained in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or *property so acquired by her* through the exercise of any literary, artistic, or scientific skill, and all *investments of such wages, earnings, money or property*, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and *her receipts alone* shall be a good discharge for such wages, earnings, money and *property.*"

[And by the eleventh section, "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money and *property* by this act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever, for the *protection and security* of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof, for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels and property to be her property."

Under these two sections, it was decided that a married woman can maintain an action in her own name for damages against her bankers for dishonoring cheques drawn by her in the course of a trade carried on by her separately from her husband, or for not duly presenting or not giving due notice of dishonor of a bill of exchange acquired by her in such trade, and entrusted to them by her for presentment. (n) The decision was given on the special ground that the plaintiff's remedy was one for the protection of her earnings within the meaning of the eleventh section, and it does not, therefore, follow that a married woman can in every case maintain an action of damages in her own name, for a breach of a contract made in reference to her separate trade.

As to what constitutes a married woman's separate trade or business, within the meaning of the act, the reader is referred to the cases of *Ashworth v. Outram*, 5 Ch. D. 923, C. A., and *Lovell v. Newton*, 4 C. P. D. 7.

*Summers v.
The City
Bank.*

*Ashworth v.
Outram.*
*Lovell v.
Newton.*

(n) *Summers v. The City Bank*, L. R., 9 C. P. 580.

It is not necessary that the wife should live apart from her husband in order to entitle her to the protection afforded by the act, but if her husband reside with her in the same house where the business is carried on, she must have the sole control over and management of the business. (o) The protection of the act extends to the stock-in-trade of the wife's separate trade or business, for without it the "wages" and "earnings," which it is the object of the act to protect, cannot be made. (p)

But except under the custom of London, or when her husband is *civiliter mortuus*, or when she is living apart from him under a protection order, (p) a married woman is not liable to be made a bankrupt even although she has separate estate, and has contracted engagements after her marriage. The married women's property act, 1870, has made no difference in this respect. (q) 39

(o) *Ashworth v. Outram*, *ubi supra*; *Lovell v. Newton*, *ubi supra*; *Laporte v. Costick*, 31 L. T. (N. S.) 434.

(p) *Ashworth v. Outram*, *ubi supra*; *Lovell v. Newton*, *ubi supra*.

(p) See *Ramsden v. Brearley*, *ubi supra*.

(q) *Ex parte Jones*, 12 Ch. D. 484, C. A. The doubt expressed by Mellish, L. J., in *Ex parte Holland*, 9 Ch. 307, at p. 311, is solved by this decision. See, also, on this subject, *Robson on Bankruptcy*, (ed. 1881), p. 99.

39. Capacity to purchase under the Married Women Statutes.—Statutes similar to those stated in the text are in force in all the United States. All provide that the property of a married woman at the time of her marriage, or the property acquired by her after marriage, shall be her separate estate, as if she were a *feme sole*. In some of the states express capacity to contract is given within certain limits. Where no express power to contract is given, a married woman has the same power to contract with reference to her separate estate as she had before the statute, in equity, as to her separate estate, but no power aside from such estate to

bind herself personally; the act being held to operate only on the right of property, not on the power to dispose of it. *Yale v. Dederer*, 18 N. Y. 265; *Owen v. Cawley*, 36 N. Y. 600; *Todd v. Lee*, 15 Wis. 365, 380; *Jones v. Crosthwaite*, 17 Iowa 393; *Shonk v. Brown*, 61 Penna. St. 320; *Kantrowitz v. Prather*, 31 Ind. 92; *Tracy v. Keith*, 11 Allen 215; *Whitworth v. Carter*, 43 Miss. 61; *Dunbar v. Meyers*, 43 Id. 679; *Pond v. Carpenter*, 12 Minn. 430; *Bauer v. Bauer*, 40 Mo. 61; *Eckert v. Reuter*, 33 N. J. L. 266; *Glyde v. Keister*, 1 Grant 465. Whether a married woman who has no separate estate can purchase property on her personal credit, thus acquiring an estate and incurring a debt by the same act, is a question on which courts have differed. Mr. Kelly, in his work on *Contracts of Married Women*, (1882), says that the true doctrine is that a married woman having no separate estate, may acquire one by purchase on credit, and sustains his position by abundant citations. See ch. VI., § 17. In Pennsylvania, however, the law has been adjudged to be as follows: "The wife's earnings belong to her husband, and if she purchases property with

§ 37. In equity, where a married woman has a separate estate, [not subject to a restraint upon anticipation, (r)] she is to a certain extent considered as a *feme sole* with respect to that property, and may so contract as to render it liable for the

Married
woman:

8. In equity.

borrowed money, or on credit, it belongs to her husband as respects his creditors and is liable for his debts." *Buchan v. Ream*, 68 Penna. 421; *Robinson v. Wallace*, 89 Id. 129. But if she has a separate estate which is the foundation of the credit, she may buy on credit, and hold against her husband and his creditors. *Sixbee v. Bowen*, 91 Penna. 149; *Silvens v. Porter*, 74 Id. 448; *Seeds v. Kahler*, 76 Id. 262. See, also, *Dunbar v. Meyer*, 43 Miss. 679; *Carpenter v. Mitchell*, 50 Ill. 470. The New York Court of Appeals sustains the right to create a separate estate by purchase on credit. In *Ackley v. Westervelt*, 86 N. Y. 448, Earl, J., said: "It is no longer open to dispute in this state that a married woman, although she carries on no business on her own account, and has no separate estate, is liable, like a *feme sole*, for debts contracted in the purchase of real estate or other property." It must be observed, however, that a married woman in New York cannot contract, except with reference to her separate estate. In *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 83, the following are enumerated as the only contracts the wife can make: *First*. When they are made in or about carrying on a trade or business. See *Freeking v. Rolland*, 53 N. Y. 422. *Second*. When the contract relates to or is made for the benefit of the separate estate. *Owen v. Cawley*, 36 N. Y. 600. *Third*. When the intention to charge is expressed in the instrument or contract by which the liability is created. *Yale v. Dederer*, 22 N. Y. 450. It was accordingly held in *Manhattan B. & M. Co. v. Thompson*, *supra*, that the wife's writing stating that her husband was authorized to contract for her and that she would be responsible

for the fulfillment of any contract made by him, is not binding on her. In New Jersey the statutes and decisions are similar to those of New York, with the notable exception that a married woman cannot bind herself by any form of contract to pay the debt of another. She may, however, mortgage or pledge specific lands or chattels or personalty to secure the debt of another, but will not become personally liable. *Van Kirk v. Skillman*, 34 N. J. L. 109; *Perkins v. Elliott*, 23 N. J. Eq. 526. In Illinois there was much conflict in the interpretation of the enabling act as to the extent of the powers of married women to contract, but in 1874 an act was passed providing that a married woman may own, manage and sell property, to the same extent and in the same manner that the husband can property belonging to him. She may make contracts and incur liabilities as if unmarried, except that she may not enter into any partnership without her husband's consent. "As to the property of the wife, protected as her separate property by the statutes, in reference thereto the husband occupies the same relation as does a stranger." *Tomlinson v. Mathews*, 98 Ill. 182; *Bennett v. Stout*, 98 Ill. 49. The foregoing cases will illustrate the questions arising under the various enabling acts. For a full and clear statement as to all of the states, see *Kelly on Contracts of Married Women* (1882.)

(r) *Pike v. Fitz Gibbon*, 17 Ch. D. 454, C. A., where the extent to which equity treats a married woman entitled to separate estate as a *feme sole* is defined; per *Cotton, L. J.*, at p. 464. The court now has power to dispense with the restraint upon anticipation. 44 and 45 Vict., c. 41, § 39, Conv. Act, 1881; *Hodges v. Hodges*,

payment of her debts. In respect of her purchases, the law is that if she, "having separate property, [as to which there is no restraint upon anticipation,] enters into a pecuniary engagement, whether by ordering goods or otherwise, which if she were a *feme sole* would constitute her a debtor, and in entering into such engagements she purports to contract not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable." (s) 40

30 W. R. 483; *Tamplin v. Miller*, W. N. 1882, p. 44.

(s) *Mrs. Matthewman's Case*, 3 Eq. 781, 787. See, also, *Shattock v. Shattock*, 2 Eq. 182; 35 L. J., Ch. 509; *Johnson v. Gallagher*, 3 D., F. & J. 404; 7 Jur. (N. S.) 373; 30 L. J., Ch. 298; *The London Chartered Bank of Australia v. Lempriere*, L. R., 4 P. C. 572, and the conclusive settlement of the law in *Picard v. Hine*, 5 Ch. 274.

40. At common law the only mode to preserve to a married woman a separate estate was to give it in trust for her use, which trust courts of equity would sustain and enforce. The text states in what manner she may bind this separate estate for her debts in England. The fact that she personally incurs a debt is of itself sufficient evidence that she means to charge her separate estate with it. In New York and Massachusetts the law varies little from that in England, the principal difference, perhaps, consisting in this, that where the debt is not incurred for the benefit of the separate estate, the intent to charge it must expressly appear as a part of the contract, verbal or written, in order to bind the separate estate. *Yale v. Dederer*, 22 N. Y. 451; *Maxon v. Scott*, 55 Id. 247; *Willard v. Eastham*, 8 Gray 328. But in most of the states the powers of married women have been restricted, and it has been held that their contracts shall only

bind the estate when the instrument creating it so authorizes. This is expressed by Gibson, J., in *Thomas v. Folwell*, 2 Whart. 11, as follows: "We hold it to be the settled law of Pennsylvania that instead of having every power from which she is not negatively debarred in the conveyance, [to her trustee], she shall be deemed to have none but what is positively given or reserved to her." Approved, *Machir v. Burroughs*, 14 Ohio St. 519; *Wright v. Brown*, 44 Penna. 224. This question by no means lost its interest by the passage of the "enabling acts." On the contrary, it became of greatly increased importance. In the language of Ch. J. Beasley, in New Jersey Court of Appeals, (referring to the New Jersey statute, which was a copy of the New York act of 1845): "The entire effect of that act is, according to my construction, to create in favor of the married woman that kind of estate which would result if these same statutory words were inserted in a deed or will. The words here used are technical, having long been in use, and their meaning and legal effect have been in most respects fully established. They should have the same force whether found in a private instrument or in a public statute. The purpose of the law is entirely effectuated by putting in the wife that title to her property which is so well known to equity under the designation of her separate

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The 45 and 46 Vict., c. 75 (The Married Women's Property Act, 1882,) which came into operation on the first of January of the present year, received the royal assent some time after the sheets of the earlier part of this edition had been sent to the press. The new act, which repeals the earlier acts of 1870 and 1874, except as to any rights or liabilities accruing under them, entirely alters the position of married women at common law, and in a great measure their position in equity. It enables them to acquire, hold and dispose of every species of property, to contract, and to sue and be sued apart from their husbands, and confers upon them for these purposes an independent *status*. The following sections of the act are those which seem more or less to bear upon the special subject of this treatise.

Married Women's Property Act, 1882, repeals Acts of 1870 and 1874.

The 1st section provides that (1) "A married woman shall, in accordance with the provisions of the act, be capable of *acquiring*, holding and *disposing* by will or otherwise, of any real or *personal property* as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. (2) A married woman shall be capable of *entering into and rendering herself liable* in respect of and to the extent of her separate property *on any contract*, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. (3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. (4) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. (5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

Sec. 1, subsect. 1.

Married woman to be capable of holding property and of contracting as a *feme sole*.

Contract to bind after-acquired separate property.

Married woman separate trader liable to bankruptcy.

And the 2nd section enacts that "Every woman who marries after the commencement of the act shall be entitled to have and to hold as her separate property and to dispose of in man-

Sec. 2.

Property of a woman married after the act to be held by her as a *feme sole*.

ner aforesaid all real and *personal property* which shall belong to her at the time of marriage, or shall be *acquired by or devolve upon her* after marriage, including any wages, earnings, money, and *property gained or acquired by her* in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

By the 5th section "Every woman married *before* the commencement of the act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and *personal property*, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* the commencement of the act, including any wages, earnings, money, and *property* so gained or acquired by her as aforesaid.

Sect. 5.

Property acquired after the act by a woman married before the act to be held by her as a *feme sole*.

By the 6th section *all investments* therein specified (which it is believed include every kind of investment), which at the commencement of the act were standing in the sole name of a married woman, are to be deemed, unless and until the contrary be shown, to be the separate property of such married woman: and the fact that any such investments as aforesaid are standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or *transfer the same without the concurrence of her husband*, and to indemnify the individuals or public bodies, with whom the investments are made, in respect thereof.

Sect. 6.

As to stock, &c., to which a married woman is entitled.

By the 7th section any interest in any corporation, company, public body, or society, which after the commencement of the act shall be allotted to, or placed or registered or transferred in, or into, or made to stand in the sole name of any married woman, is to be deemed, unless and until the contrary be shown, to be her separate property, in respect of which her separate estate shall alone be liable; but nothing in the act is to require or authorize any corporation or joint-stock company to admit a married woman to be a holder of shares, to which any liability may be incident, if they are prohibited from doing so by their constitution or by-laws.

Sect. 7.

As to stock, &c., to be transferred, &c., to a married woman.

Sect. 8.

Investments in joint names of married women and others.

By the 8th section the foregoing provisions are to apply, as well to investments in the name of any married woman jointly with any persons or person *other than her husband*, as to investments in her sole name.

By the 9th section it shall not be necessary for *the husband* of any married woman, *in respect of her interest, to join in the transfer* of any investment as aforesaid, which is, at the commencement of the act, or shall be at any time thereafter, standing in the sole name of any married woman, or in the joint names of such married woman and any person or persons not being her husband.

Sect. 9.

As to stock, &c., standing in the joint names of a married woman and others.

By the 12th section "Every woman, *whether married before or after the act*, shall have in her own name against all persons whomsoever, *including her husband*, the same civil remedies * * * *for the protection and security of her own separate property*, as if such property belonged to her as a *feme sole*, * * * and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding."

Sect. 12.

Remedies of married women for protection and security of separate property.

By the 19th section all existing and future settlements are saved, and it is provided that the act shall not interfere with, or render inoperative, any *restriction against anticipation*.

Sect. 19.

Saving of existing settlements.

From a consideration of these sections of the act it is manifest that for the future, where a married woman has property which is either settled to her separate use or created her separate property by the provisions of the act, she will, unless restrained from anticipation, be, to the extent of that property, in the same position as if she were a *feme sole*. It is presumed that with regard to property acquired by her as a separate trader, she will be in the same position. The rights and liabilities acquired and incurred by married women under the Married Women's Property Acts, 1870 and 1874, are preserved by the new act. The question raised in *Summers v. The City Bank* (o) (*ante* § 36), as to a married woman's general right to maintain an action in her own name for damages for breach of contract, is settled by sect. 1, subsect. 2, of the new act, while the doctrine of *Ashworth v. Outram* (p) (*ante* § 36), as to stock-in-trade, is rendered obsolete by sect. 2. A married woman, deserted by her husband, would seem no longer to require a protection order under 20 and 21 Vict., c. 85 (*ante* § 36.)

Effect of these sections.

As to a married woman's liability to bankruptcy, the act will probably give rise to some doubt. A married woman carrying on a trade separately from her husband is expressly made liable to bankruptcy by sect. 1, subsect. 5, and the natural inference is that as the act points out a

Married woman's liability to bankruptcy under the act

(o) L. R., 9 C. P. 580.

(p) 5 Ch. D. 923, C. A.

particular case in which married women are to be liable, their liability is excluded in every other. It was held in *Ex parte Jones* (q) (*ante* § 36, note, (q) that before the Married Women's Property Act, 1870, a married woman was not liable to bankruptcy, and that the act had not altered her position in that respect. But the ground of the decision of the Court of Appeal in that case was, that the act of 1870 had not rendered the married woman liable to be personally sued as a debtor. Now, under sect. 1, subsect. 2, of the act 1882, a married woman is liable to be sued in all respects as if she were a *feme sole*, but it is not clear from the context whether the liability is intended to be a personal one or to be limited to the amount of her separate estate, in which latter case, it is submitted, she would not be personally liable. It is obvious that the exemption from bankruptcy is of no benefit to the married woman, for all her property can be taken in execution by her creditors, and it is certainly a hardship on them to be under the necessity of adopting so circuitous a method of reaching the property of a person who is now, for all practical purposes, *sui juris*.

The great change which the act has introduced in the equitable doctrine of a married woman's capacity to contract is contained in sect. 1, subsect. 4, *supra*. It was held by the Court of Appeal, in *Pike v. Fitzgibbon* (r) (*ante* § 37, note (r)), that a married woman could not bind by her contract any but the separate property of which she was possessed at the time of making the contract. But by the above subsection of the act every contract entered into by a married woman with respect to and to bind her separate property, will bind all her separate property, both that of which she is possessed at the time of the contract and any which she may have afterwards acquired.

It is also to be noticed, with regard to a married woman contracting as agent, whether for her husband or another, that by sect. 1, subsect. 3, *supra*, her contract will be deemed to have been entered into with respect to and to bind her separate property unless the contrary be shown. It is not clear that this enactment will affect the husband's liability in cases where his wife would have been presumed to be his agent before the act, although it makes the wife liable unless she can prove that she did not contract on the faith of her separate estate. (s)

Married woman's contract to bind after-acquired separate property.

Married woman contracting as agent.

(q) 12 Ch. D. 484, C. A.

(r) 17 Ch. D. 454, C. A.

(s) On these and other questions suggested by the act the reader is referred to

Mr. Thicknesse's book on The Married Women's Property Acts, who has kindly assisted the editors in the preparation of this note.

estate." *Perkins v. Elliott*, 23 N. J. Eq. 526, 533. Accordingly we have a variety of decisions under these enabling acts, until, as remarked in the case last cited, "it is, perhaps, not too much to say that the law is not identical in any two of the United States." In New Jersey, by the same case, the law is settled as follows: "The true doctrine seems to me this, that to the extent that the *feme* does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discover, and cannot bind herself or her possessions." 23 N. J. Eq. 533. This would probably be accepted as a correct statement of the law in Pennsylvania. For a full statement as to each of the states separately, see *Kelly on Contracts of Married Women*.

CHAPTER III.

MUTUAL ASSENT.

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SECTION I.—OF MUTUAL ASSENT.

§ 38. The assent of the parties to a sale need not be express. It may be implied from their language, (a) or from their conduct; (b) may be signified by a nod or a gesture, or may

(a) See a curious case of what one of the judges termed a "grumbling" assent, in *Joyce v. Swan*, 17 C. B. (N. S.) 84.

(b) *Brogden v. Metropolitan Railway Company*, 2 App. Cas. 666, where the parties had acted upon the terms of a draft proposed agreement, which was intended to form the basis of a formal contract, to be afterwards executed by them both.

even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods. (c) ¹

But the assent must, in order to constitute a valid contract, be *mutual, and intended to bind both sides*. It must also *co-exist at the same moment of time*. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional*. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made

Must be
mutual,

and uncondi-
tional,

(c) Bl. Com., Book II., ch. 30, p. 443; *Hoadley v. M'Laine*, per Tindal, C. J., 10 Bing. 482.

1. The acceptance of an offer may be signified by performance alone. "There is nothing more significant of the acceptance of a proposition than compliance with it, especially where notice of acceptance is not required." Thompson, C. J., in *Patton v. Hassinger*, 69 Penna. 311, 314; *Cooper v. Altimus*, 62 Penna. 486; *Crook v. Cowan*, 64 N. C. 743; *Lungstrass v. German Ins. Co.*, 48 Mo. 200; *Fenton v. Braden*, 2 Cranch C. C. 550. Such performance must strictly accord with the offer. So where the seller wrote asking B. to guarantee payment for lumber to be sold to C., and B. wrote that it might be charged to himself, but the seller delivered it and charged it to C.—*Held*, that B. was not bound, his offer being to become principal debtor and not surety. *Smith v. Wetherell*, 4 Ill. App. 655. See *Ueberoth v. Riegel*, 71 Penna. 280. So where a part of the offer is the signing of a written agreement, performance with-

out signing will not bind the other party unless he accepts it. *Morrill v. Tehama Co.*, 10 Nev. 125; *Northam v. Gordon*, 46 Cal. 582. Otherwise if he knows of the performance and permits it without objection, *Miller v. McMains*, 57 Ill. 126. But no contract can be implied where an express agreement controls the terms which would otherwise be raised by implication. *Wood v. Edwards*, 19 Johns. 212; *Commercial Bank v. Pfeiffer*, 29 N. Y. Sup. Ct. 327; *Walker v. Brown*, 28 Ill. 378; *Voorhees v. Combs*, 33 N. J. L. 494. The delivery of goods or rendering of services will not raise an implied contract where the circumstances indicate a gift. *Cable v. Ryman*, 16 Ind. 207; *Carpenter v. Weller*, 22 N. Y. Sup. Ct. 134; *Whaley v. Whaley*, 49 Mo. 80. But where the vendor claimed to have sold goods and sent them to the alleged buyer, who received and appropriated them knowing of the claim of sale, it was held that the buyer could not disclaim the purchase. *Wellauer v. Fellows*, 48 Wis. 105.

cannot afterwards bind the intended vendor by a simple acceptance of the first offer.²

[The assent must either be *communicated* to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication, and communi-
cated. as, *e. g.*, in contracts by correspondence, the posting of the letter of

2. *Bank v. Hall*, 101 U. S. 43, 50; *Elia-son v. Henshaw*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *Utley v. Donaldson*, 94 U. S. 29; *Gowing v. Knowles*, 118 Mass. 232; *Harlow v. Curtis*, 121 Mass. 320; *Borland v. Guffey*, 1 Grant (Pa.) 394; *Johnston v. Fessler*, 7 Watts 48; *Demuth v. American Institute*, 75 N. Y. 502; *Corning v. Colt*, 5 Wend. 253; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Johnson v. Stephenson*, 26 Mich. 63; *Ebarts v. Selover*, 44 Mich. 519; *Lans v. McLaughlin*, 14 Minn. 72; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Steel v. Miller*, 40 Iowa 402; *Bruner v. Wheaton*, 46 Mo. 363; *Eamay v. Gorton*, 18 Ill. 483; *N. W. Iron Co. v. Meade*, 21 Wis. 474; *Jenness v. Mount Hope Co.*, 53 Me. 20; *Belfast, &c., Co. v. Unity*, 62 Ma. 148; *Cumberland Bone Co. v. Atwood Lead Co.*, 63 Me. 167; *Fenno v. Weston*, 31 Vt. 345; *McIntosh v. Brill*, 20 U. C. C. P. 426; *Marshall v. Jamieson*, 42 U. C. Q. B. 115; *Carter v. Bingham*, 32 U. C. Q. B. 615; *Webb v. Sharman*, 34 Id. 410.

The Manner of Acceptance must Comply with the Offer.—The mode of acceptance must accord with the mode, if any, suggested in the offer. Thus where the answer was requested by "return of wagon" to Harper's Ferry, and instead was sent by mail to the residence of the proposer at Georgetown, it was held that there was no contract. *Eliaison v. Henshaw*, 4 Wheat. 225. In this case, Justice Washington said: "An acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they de-

clined doing." This was followed in *Carr v. Duval*, 14 Pet. 77, where an answer was desired by return mail, and an acceptance later was held not to bind. On the same principle where it is part of the offer that the contract shall be put in writing, or the assent is given subject to a provision as to a contract in writing, it will not be valid until written and signed by all parties. Add. on Cont., § 20; *Maitland v. Wilcox*, 17 Penna. 231; *Barber v. Burrows*, 51 Cal. 404; *Morrill v. Tehama, &c., Co.*, 10 Nev. 125; *Eads v. City of Carondelet*, 42 Mo. 113; *Bourne v. Shapleigh*, 9 Mo. App. 64. But see note 5, *infra*.

Partial Assent.—There will be no contract though an offer is accepted, if the offer or acceptance states that other details are to be thereafter arranged. *Brown v. N. Y. Cent. R. R.*, 44 N. Y. 79; *Northam v. Gordon*, 46 Cal. 582; *Bigley v. Risher*, 63 Penna. 152. In *Brown v. N. Y. Cent. R. R.*, Commissioner Earl quotes with approval the language of Judge Foster in *Lyman v. Robinson*, 14 Allen 254, as follows: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe, as an agreement, letters which the parties intended only as a preliminary negotiation. The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" See *Brown v. Finney*, 53 Penna. 373; *McKibbin v. Brown*, 14 N. J. Eq.

acceptance; or the assent may be inferred from subsequent conduct; but an assent which is neither communicated to the other party nor followed up by action, a mere "mental assent," as it is termed, is insufficient. (d)]³

The cases are very numerous (e) in support of these principles,

13; affirmed on appeal. But where the parties could not agree on the terms of a contract, when they undertook to reduce it to writing, but executed it by common consent, both are bound by the verbal contract. *Peck v. Miller*, 39 Mich. 594. See *Blight v. Ashley*, Pet. C. C. 15.

No Assent Implied to an Unknown Offer.—There can be no assent, and therefore no sale, where one party does not know of the other's offer. *Ball v. Newton*, 7 Cush. 599. Therefore a bill of sale mailed to the vendee named therein, without his knowledge, will not take effect until received and accepted by him. *McCutchin v. Platt*, 22 Wis. 561; *Welch v. Sackett*, 12 Wis. 243; *Dudley v. Deming*, 34 Conn. 169. An acceptance, however, may sometimes take effect before it comes to the knowledge of the other party. See § 44, *infra*.

Sham Assent.—The forms of a sale will not operate as such if the parties intend otherwise. *Cox v. Jackson*, 6 Allen 108; *Bradley v. Hale*, 8 Id. 59; *Bruce v. Bishop*, 43 Vt. 161.

An Assent will not be Nugatory because of an Immaterial Addition.—Of course the question will always arise whether an addition to an assent is a variance from the terms of an offer. If the assent merely expresses what the law would imply, the contract is binding, and so if to the assent is added a mere hope or wish. *Clark v. Dales*, 20 Barb. 42; *Phillips v. Moor*, 71 Me. 78; *Matteson v. Scofield*, 27 Wis. 671; *Fitzhugh v. Jones*, 6 Munf. 83; *Brisban v. Boyd*, 4 Paige 17; *O'Neill v. James*, 43 N. Y. 84.

(d) *Brogden v. Metropolitan Railway Company*, 2 App. Cas. 666, where Lord Selborne, at p. 688, and Lord Blackburn,

at p. 691, take occasion to dissent from some unreported expressions of opinion on this point by the judges of the Court of Common Pleas.

3. *Beckwith v. Cheever*, 21 N. H. 41; *McDonald v. Boeing*, 43 Mich. 394; *Lungstrass v. German Ins. Co.*, 48 Mo. 201. But in *Yaeger, &c., Co. v. Brown*, 128 Mass. 171, it appeared that flour was consigned to be, at the consignee's option, either a sale to him or a consignment to sell on commission. In a contest over the title he was allowed to testify that on receipt of the flour he elected to take it as purchaser. This case seems open to criticism. An option to buy is a mere offer. *Hunt v. Wyman*, 100 Mass. 198. The admission of such testimony implies that there is some value in an uncommunicated assent to an offer. If competent at all, it is conclusive, unless the witness is impeached, for from its very nature it cannot be controverted. "The thought of man is not triable, for even the devil does not know what the thought of man is." Quoted from *Brian, C. J.*, under *Edw. IV.*, in *Brogden v. Metropolitan Railway Co.*, 2 App. Cases 666, 692. See *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Shupe v. Galbraith* 32 Penna. 10; *McCulloch v. Ins. Co.*, 1 Pick. 278; *McCall v. Powell*, 64 Ala. 254.

(e) *Champion v. Short*, 1 Camp. 63; *Routledge v. Grant*, 4 Bing. 653; *Hutchinson v. Bowker*, 5 M. & W. 535; *Jordan v. Norton*, 4 M. & W. 155; *Wontner v. Sharp*, 4 C. B. 404; *Duke v. Andrews*, 2 Ex. 290; *Chaplin v. Clarke*, 4 Ex. 403; *Forster v. Rowland*, 7 H. & N. 103, and 30 L. J., Ex. 376; *Honeyman v. Marryat*, 6 H. L. C. 112; *Andrews v. Garrett*, 6 C. B. (N. S.) 262; *Proprietors Eng. & For.*

which are common to all contracts. A few only of those peculiarly illustrative of the rules as applied to contracts of sale need be specially noticed.

§ 39. In *Hutchinson v. Bowker*, (*f*) the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied:—
Hutchinson v. Bowker. “Such offer we accept, expecting you will give us *fine barley*, and *full weight*.” The defendant wrote back: “You say you expect we shall give you ‘fine barley.’ Upon reference to our offer you will find no such expression. As such, we must decline shipping the same.” It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury, although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The court held that it was for the jury to determine the meaning of the words, and for the court to decide whether there had been mutual assent to the contract; and the plaintiff was nonsuited, on the ground that he had not accepted the defendant’s offer.

In *Hyde v. Wrench*, (*g*) defendant offered to sell his farm to plaintiff for £1000. The plaintiff, thereupon, offered him £950, which defendant refused. Plaintiff then accepted the offer at £1000, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally answered it by a counter-proposal to purchase at a lower price, “he thereby rejected the offer,” and that no contract had ever become complete between the parties.

[But a mere *inquiry* of the proposer whether he will agree to modify the terms of his offer, is not a counter-proposal entitling him to treat his offer as rejected. Thus, in *Stevenson v. McLean*, (*h*) the defendant, being possessed of warrants for iron, wrote to the plaintiffs offering to sell them for “40s. nett cash, open till Monday.” On the Monday morning the plaintiffs telegraphed to the defendant, “Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give.” Held, not to be a refusal of the defendant’s offer, and the

An inquiry as to the terms not a rejection of the offer.

Cr. Co. v. Arduin, L. R., 5 H. L. 64; *Dowdeswell*, L. R., 10 C. P. 102; *Wynne’s Case*, 8 Ch. 1002; *Beck’s Case*, 9 Ch. 392; *Addinell’s Case*, 1 Eq. 225, affirmed in H. L., *sub nom. Jackson v. Turquand*, L. R., 1 H. L. 305; *Crossley v. Maycock*, 18 Eq. 180, and cases there cited; *Appleby v. Johnson*, L. R., 9 C. P. 158; *Stanley v.* (f) 5 M. & W. 535.
 (g) 3 Beav. 336.
 (h) 5 Q. B. D. 346.

plaintiffs having afterwards accepted the offer while it remained open, that the defendant was bound, and *Hyde v. Wrench* was distinguished.]⁴

In *The Governor, Guardians, &c., of the Poor of Kingston-upon-Hull v. Petch*, (i) plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant Governor, &c., of Kingston-upon-Hull v. Petch. tendered, and received notice of the acceptance of his tender, and then wrote that he declined the contract. Held, that by the terms of the proposal, the contract was not complete till the terms were put in writing, and signed by the parties, and that the defendant had the right to retract.

In *Jordan v. Norton*, (k) defendant offered to buy a mare, if warranted "sound, and quiet in harness." Plaintiff sent the mare, with warranty that she was "sound, and quiet in double harness." Held, no complete contract. Jordan v. Norton.

In *Felthouse v. Bindley*, (l) a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered £30. The uncle wrote back saying, "Your price I admit was thirty guineas, I offered £30, never offered more, and you said the horse was mine; however, as there may be a mistake about him I will split the difference, £30 15s., I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at £30 15s.*" This letter was dated on the 2d of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. Held, that there had been no complete contract between the uncle and the nephew, because the latter had never communicated to the former any assent to the sale at £30 15s.; that the uncle had no right to put upon his nephew the burthen of being bound by the offer Felthouse v. Bindley.

4. Counter-Proposition.—A counter-proposition to an offer is equivalent to a refusal. After it, an acceptance of the original offer will not bind the other party without his consent. *Fox v. Turner*, 1 Bradw. 153; *Baker v. Johnson Co.*, 37 Iowa 186; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Snow v. Miles*, 3 Cliff 608.
 (i) 10 Ex. 610, and 24 L. J., Ex. 23.
 (k) 4 M. & W. 155.
 (l) 11 C. B. (N. S.) 869; 31 L. J., C. P. 204.

unless rejected; and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was nonsuited, on the ground that he had no property in the horse at the date of the alleged conversion. (m)

§ 40. [In *Appleby v. Johnson* (n) the plaintiff wrote to the defendant proposing to enter his service as salesman upon certain terms, including, amongst others, a commission upon all sales to be effected by him: for which purpose a list of merchants with whom he should deal was to be prepared. The defendant replied as follows: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but *I think we are quite agreed on all.* We shall, therefore, expect you on Monday;" and in a postscript added, "I have made a list of customers, which we can consider together." Held, not to be an absolute and unconditional acceptance of the defendant's proposal.

This decision seems open to some criticism. The defendant's letter may fairly be read as a substantial acceptance of the plaintiff's offer, coupled with the expression of a desire that some of its terms should be more clearly defined and reduced into writing. It would then fall within the principle of that numerous class of cases (o) where the existence of a binding contract has been upheld, although the parties to the contract have contemplated a subsequent formal expression of its terms. Brett, J., appears to have taken this view at the trial of the action: while Honeyman, J., expressed reluctance in concurring in the judgment of the court.]⁵

(m) It was further held in this case that the nephew's acceptance of the offer after conversion, but before the action brought by plaintiff, did not relate back to the date of the offer, so as to enable the plaintiff to maintain the action.

(n) L. R., 9 C. P. 158.

(o) *Crossley v. Maycock*, 18 Eq. 180; *Brogden v. Metropolitan Railway Co.*, 2 App. Cas., at p. 672; *Lewis v. Brass*, 3 Q. B. D. 667, C. A.; *Bossiter v. Miller*, 3 App. Cas. 1124; *Bounnewell v. Jenkins*, 8 Ch. D. 70, C. A.

5. Effect of Agreement to be put in Writing.—We have already seen (note 2, *supra*.) that where it is part of an offer

or of an assent that the agreement shall be written, no contract is concluded until that is done. But this must be distinguished from that class of cases where the parties conclude an agreement, intending to be bound by it, but contemplate a more formal expression of their contract. To the English cases cited by our author may be added *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 645, and *Ridgway v. Wharton*, 6 H. of L. Cas. 264, 268. In a recent case in the New Jersey Court of Errors and Appeals the principle was affirmed. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, 273. Depue, J., said: "The fact that parties negotiating a con-

In *Watts v. Ainsworth* (*p*) will be found a good illustration by Bramwell, B., of the mode of construing a correspondence when a contest arises as to the existence of mutual assent. *Watts v. Ainsworth.* See also the opinions delivered in the house of lords in the case of *The Proprietors of the English and Foreign Credit Company v. Arduin*, where the unanimous judgments of the Exchequer of Pleas, and of the Exchequer Chamber, were unanimously reversed. (*q*)

§ 41. It is a plain inference from these cases, that a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance, there is nothing by which the proposer *can* be bound; and the authorities quite support this inference. Even when on making the offer the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may nevertheless be retracted in the interval, if no consideration has been given for the promise, [and provided that the retraction is duly *communicated* to the other party before he has accepted the offer. (*r*)]⁶

Proposal may be retracted before acceptance.

Promise to leave proposal open, not binding, if without consideration, and if revocation is communicated before acceptance.

tract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement." And he proceeds to quote with approval the following language of Lord Westbury in *Chinnock v. Marchioness of Ely*: "As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the parties to be charged, there exist all the materials which this court requires to make a legally binding contract. But, if to a proposal or offer an assent be given sub-

ject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." (Of course, signing by the party to be charged is necessary only in the cases of contracts within the statute of frauds.) See *Blight v. Ashley*, Pet. C. C. 15; *Peck v. Miller*, 39 Mich. 594; *Bell v. Offutt*, 10 Bush 632; *Mackey v. Mackey*, 29 Gratt. 158; *Pratt v. Railroad Co.*, 21 N. Y. 805; *Blaney v. Hoke*, 14 Ohio St. 292.

(*p*) 1 H. & C. 83; 31 L. J., Ex. 448.

(*q*) L. R., 5 H. L. 64.

(*r*) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

6. *Moline Scale Co. v. Beed*, 52 Iowa 307; *Railroad Co. v. Bartlett*, 8 Cush. 224; *Brown v. Rice*, 29 Mo. 322; *Weiden v. Woodruff*, 38 Mich. 130; *Falls v. Gathier*, 9 Porter 606; *Water Comm'rs of Jersey City v. Brown*, 32 N. J. L. 504; *Haughwout v. Boisaubin*, 18 N. J. Eq. 315; *Belfast, &c., B. R. v. Unity*, 62 Me. 148; *Johnson v. Filkington*, 39 Wis. 62.

Cooke v. Oxley (s) is the leading case on this point. The declaration was that the defendant had proposed to sell and deliver to the plaintiff two hundred and sixty-six hogsheads of tobacco on certain terms if the plaintiff would agree to purchase them on the terms aforesaid, *and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* Averment, plaintiff did agree, &c., and did give notice, &c., and requested delivery, and offered payment. Judgment arrested after verdict for the plaintiff. Kenyon, C. J., delivering judgment, said: "Nothing can be clearer than that, at the time of entering into this contract, the engagement was all on one side. The other party was not bound. It was, therefore, *nudum pactum.*" Buller, J., said: "It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract (promise?) was first made. Then as to the subsequent time: the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale, from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." Grose, J., said: "The agreement was not binding *on the plaintiff* before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise."

This decision was afterwards affirmed in the Exchequer Chamber, M. 32 Geo. III. (t)

§ 42. [The principle of *Cooke v. Oxley* has been affirmed in the most recent cases, with this limitation, that the retractation of the

"Giving the refusal" for a specified time is a mere offer, and may be withdrawn at any time. If not withdrawn it comes to an end at the close of the time limited, such time being always of the essence of an offer. *Faulkner v. Hebard*, 26 Vt. 452; *Longworth v. Mitchell*, 26 Ohio St. 334, 342; *Larmon v. Jordan*, 56 Ill. 204. An offer to several persons jointly may be withdrawn at any time before acceptance by all. *Burton v. Shotwell*, 13 Bush 271.

A Change of the Law may Operate to Retract an Offer.—The law in force when an offer is made forms part of it. An acceptance after the law has been so changed as to affect the terms, comes too late. *Mercer Co. v. Pittsburg, &c., R. R.*, 27 Penna. 389. A revocation of an offer is of no validity unless communicated. *Wheat v. Cross*, 31 Md. 99.

(s) 3 T. R. 653.

(t) So stated in note at the end of the report, in 3 T. R. 653.

offer must have been in some way communicated to the other party before his acceptance of it. (u) A tacit retraction is insufficient. (v) In *Dickenson v. Dodds* notice *aliunde* that the defendant had agreed for the sale of the property in question to a third party was held to be sufficient notice to the plaintiff of the retraction of the defendant's offer, but there is nothing in the judgment to warrant the statement in the head-note; "*semble*, the sale of property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale.*"

Dickenson v. Dodds.

It should be observed that *Cooke v. Oxley*, which was a motion in arrest of judgment after verdict for plaintiff, turned solely upon the insufficiency of the plaintiff's allegation. Viewed in the light of subsequent decisions, it is clear that it would have been sufficient for the plaintiff to have alleged that at the time when he gave notice of acceptance of defendant's offer, no notice of its withdrawal had been communicated to him.

It is to be observed that in no case has it yet been decided that, when the parties are in immediate communication with one another, a retraction of an offer, to be effectual, must be communicated. Both *Byrne v. Van Tienhoven* and *Stevenson v. McLean* were cases where the parties had contracted by correspondence, but the language there used by the judges to the effect that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all, is perfectly general, and it is conceived that the rule would apply equally when the parties are in immediate communication with one another.]⁷

Retraction where parties in immediate communication.

(u) *Dickenson v. Dodds*, 2 Ch. D. 463, C. A.; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

(v) Per Lush, J., in *Stevenson v. McLean*, 3 Q. B. D. at p. 351; per Lindley, J., in *Byrne v. Van Tienhoven*, 5 C. P. D. at p. 347.

7. An offer, however, will not stand open forever. If no time is fixed within which it is to be accepted it must be accepted within a reasonable time, considering the nature of the contract. *Judd v. Day*, 50 Iowa 247; *Minnesota Oil Co.*

v. Collier Lead Co., 4 Dill. 431; *Chicago, &c., R. R. v. Dane*, 43 N. Y. 240; *Maxley v. Maxley*, 2 Metc. (Ky.) 309; *Averill v. Hedge*, 12 Conn. 424; *Martin v. Black*, 21 Ala. 721; *Beckwith v. Cheever*, 21 N. H. 41. And where the parties are in immediate communication with each other, that reasonable time will ordinarily be limited to the same interview. If an offer is made and not accepted, and the parties separate without any further understanding, there is no offer outstanding. *Story on Sales*, § 126. An offer by mail may by its nature or by its terms

In *Routledge v. Grant*, (x) which was the case of an offer by defendant to purchase a house, and to give plaintiff six weeks for a definite answer, Best, C. J., nonsuited the plaintiff, on proof that defendant had retracted his offer within the six weeks, and on the rule to set aside the nonsuit, said: "If six weeks are given on one side to accept an offer, the other has six weeks to put an end to it; one party cannot be bound without the other." The Chief Justice in this case cited *Cooke v. Oxley* with marked approval.

In *Payne v. Cave*, (y) it was held that a bidder at an auction may retract his bidding any time before the hammer is down; and *per curiam*, "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed." (z) 8

§ 43. In *Head v. Diggon*, (a) the defendant, on Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under- &c., &c., with three days' grace from the above date." The words were put in by the defendant expressly as a promise to await three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before—Sunday. *Holroyd, J.*, nonsuited the plaintiff, on the authority of *Cooke v. Oxley*. In the course of the argument on a new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that

require an acceptance by return of post to bind. *Macklay v. Hervey*, 90 Ill. 525; *Carr v. Duval*, 14 Pet. 77, 82; *Averill v. Hedge*, 12 Conn. 424; *Battaman v. Morford*, 76 N. Y. 622.

(x) 4 Bing. 653. See, also, *Humphries v. Carvalho*, 16 East 45.

(y) 3 T. R. 148.

(z) The ordinary condition of sale which negatives the bidder's right to retract his bidding, and which was suggested to Lord St. Leonards by the decision in *Payne v. Cave*, is, in the opinion of conveyancers, not enforceable, unless the sale has taken place under certain

special circumstances. See *Sugden V & P.* 11 (14th ed.) and *Dart V. & P.* 124 (ed. 1876.)

8. *Downing v. Brown*, Hardin 181; *Grotenkemper v. Achtermeyer*, 11 Bush 222; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Fisher v. Seltzer*, 23 Penna. 308. In this last case the right to withdraw a bid before sale was sustained, though the auctioneer had announced as one of the terms of sale that no bid could be withdrawn.

(a) 3 M. & R. 97; *Burton v. Great Northern Railway Company*, 9 Ex. 507.

the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his Lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley, J., concurred on the ground that "unless both parties are bound, neither is."

[The Great Northern Rail. Co. v. Witham (b) offers a further illustration of the same principle. The defendant sent in a tender to supply the company with iron in such quantities as they might from time to time order. The company accepted his tender, and *the defendant received and executed several orders*, but ultimately the defendant refused to carry out an order which the company had given. Held, that the order given by the company was a sufficient consideration for the defendant's promise. The court, however, pointed out that their decision did not affect the question of the defendant's right, before any order had been given by the company, to withdraw his offer by giving due notice. It is clear that, so far as the agreement was executory, it was unilateral, the company was under no obligation to give any order, and no action would lie against it for not so doing. (c)]⁹

Great North-
ern Rail. Co. v.
Witham

Another illustration of the same principle is to be found in the case of *Smith v. Hudson*. (d) There, a quantity of barley had been verbally sold according to sample, and the goods had been actually delivered to the order of the vendee, at the railway station, so as to put an end to the right of stoppage *in transitu*. But the buyer had not yet accepted so as to make the contract valid under the statute of frauds, because it was still in his power to exercise the option of accepting or rejecting after examining the quality of the bulk, to see if it corresponded with the sample. The buyer became bankrupt, and the seller at once gave notice to the railway company to hold the barley, subject to his orders; and countermanded the order to convey it to the vendee. The assignees of the buyer in-

Smith v.
Hudson.

(b) L. R., 9 C. P. 16; and see *Chicago and Great Eastern Railway Company v. Dana*, 43 N. Y. (4 Hand) 240, *post* p. 88.

(c) For this see *Burton v. Great Northern Railway Company*, *ubi supra*.

9. An agreement to sell lumber at specific prices per quality, but no quantity named, was held to be an offer revocable at any time, notwithstanding \$500 was

advanced on account of expected purchases. The purchaser recovered so much of his payment as was not required to pay for lumber ordered and delivered. *Smith v. Weaver*, 90 Ill. 392.

(d) 6 B. & S. 431; 34 L. J., Q. B. 145. See, also, *Taylor v. Wakefield*, 6 E. & B. 765.

sisted on their right to accept the goods in his place, on the ground of the actual delivery to him. But the court held that the withdrawal of the offer by the countermand of the vendor, before final acceptance, prevented the completion of the contract.

§ 44. Where the parties living at different places are compelled to treat by correspondence through the post, there is a modification of the rule to this extent, that the party making the offer cannot retract after the acceptance by his correspondent has been duly posted, although it may not have reached him; (e) [or may never reach him; (f) and the retraction to be effectual must reach his correspondent before he has posted his acceptance; (g)] nor can the party accepting retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor indeed, if it never be received. (h) 10

In *Adams v. Lindsell*, (i) the defendants wrote on the 2d of September to the plaintiff, offering to sell a quantity of wool on specified terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 7th. An answer was sent on the same evening accepting the offer. This answer was received

(e) *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381; *Potter v. Saunders*, 6 Hare 1; *Harris' Case*, 7 Ch. 587.

(f) *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A.

(g) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

(h) *Duncan v. Topham*, 8 C. B. 225; *Potter v. Saunders*, 6 Hare 1; *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A., per Baggallay and Thesiger, L. J., but see per Bramwell, L. J., at p. 235; *Dunmore v. Alexander*, 9 Shaw & Dunlop 190; and see *post* p. 68.

10. The leading American cases usually cited in support of this principle are *Mactier's Adm'r v. Frith*, 6 Wend. 104, and *Taylor v. Merchants' Ins. Co.*, 9 How. 390, both stated by our author §§ 68, 69, *infra*. More recent cases have done little more than apply the principles there es-

tablished. *O'Neill v. James*, 43 N. Y. 84; *Winterport, &c., Co. v. Schooner Jasper*, 1 Holmes 99; *The Palo Alto*, Davis 344; *Finch v. Mansfield*, 97 Mass. 89; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Hallock v. Com. Ins. Co.*, 26 N. J. L. 283; *Abbott v. Shepard*, 48 N. H. 14; *Wheat v. Cross*, 31 Md. 99; *Stockham v. Stockham*, 32 Id. 196; *Hutcheson v. Blakeman*, 3 Mete. (Ky.) 80; *Bryant v. Booze*, 55 Ga. 438. A contract by telegraph is complete when an unqualified acceptance is left at the telegraph office for transmission. *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Trevor v. Wood*, 36 N. Y. 307; *Utley v. Donaldson*, 94 U. S. 29; *Hartz v. Gooderham*, 31 U. C. Q. B. 18. Mailing a letter of acceptance completes the contract, though the letter is never received. *Washburr v. Fletcher*, 42 Wis. 152; *Vassar v. Camp*, 11 N. Y. 441.

(i) 1 B. & Ald. 681.

by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants not having received the answer, which would have been due on Sunday, the 7th, according to the course of the post, if they had not misdirected their letter making the offer, sold the wool to another person. Action for non-delivery, and verdict for plaintiff. On motion for new trial, it was contended on behalf of the defendants, on the authority of *Payne v. Cave*, (*k*) and *Cooke v. Oxley*, (*l*) that they had a right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiff, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

This case was cited with approval by Lord Cottenham in *Dunlop v. Higgins* (*m*) as a leading case, his Lordship remarking that "common sense tells us that transactions cannot go on without such a rule." In *Dunlop v. Higgins*, a proposal sent by mail on the 28th January was received on the 30th, and answered on the same day, but not by the first post of the day, so that it reached the proposer on the 1st of February, instead of the 31st of January. It was held that the answer was posted in time, and that the contract was complete by acceptance when the letter of acceptance was posted; the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of his letter of acceptance. (*n*)

§ 45. The Court of Exchequer in *The British and Amer. Tel. Co. v. Colson*, (*o*) held, however, that where the defendant had applied for shares in the plaintiff's company, and a letter allotting the shares to him had been posted to his address,

(*k*) 3 T. R. 148.

(*l*) 3 T. R. 658.

(*m*) 1 H. L. C. 381. See, also, *Potter v. Saunders*, 6 Hare 1, V.-C. Wigram's decision.

(*n*) On this point, see, also, *Duncan v.*

Topham, 8 C. B. 225; 18 L. J., C. P. 310.

But see the remarks on the accuracy of the report of this case in 8 C. B., by Bramwell, B., in *Colson's Case*, L. R., 6 Ex., at p. 120.

(*o*) L. R., 6 Ex. 108.

but not received by him, the contract was not complete, and the learned barons held, that the cases cited *supra*, in support of the contrary proposition do not warrant the inference that has been deduced from them.

But this last case has in its turn been criticised by the Lords Justices in the case of *In re The Imperial Land Co. of Marseilles—Harris' case*, (*p*) in which their Lordships intimate their inability to reconcile the decision of the Barons of the Exchequer with that of the House of Lords in *Dunlop v. Higgins*. (*q*)

[In *Harris' case* the appellant had applied by letter for shares in the respondent company. After the letter of allotment had been duly posted, but before it had reached him, Harris wrote withdrawing his application. Held, on the authority of *Dunlop v. Higgins*, that the contract was complete and irrevocable from the time that the letter of allotment was posted; but it was unnecessary for the decision of the case to consider the correctness of the judgment of the Court of Exchequer in *Colson's case*. However, the Court of Appeal has now expressly overruled *Colson's case* in *The Household Fire Insurance Co. v. Grant*. (*r*) The facts were precisely similar to those in *Colson's case*. The defendant had applied for shares in the plaintiff company, and the letter of allotment, duly addressed and posted, never reached him. It was held by the majority of the court (*Baggallay and Thesiger, L. JJ.*) that the defendant was liable as a shareholder.

Bramwell, L. J., who dissented, dwelt strongly upon the inconvenience and hardship that must in many instances result to the person making the offer, when, without any default on his part, the letter of acceptance is lost in transmission. Practically, however, this may be avoided by taking the precaution to stipulate, as suggested by *Mellish, L. J.*, in *Harris' case*, that the contract shall only be complete upon the actual receipt of the letter of acceptance. The rule is restricted to cases where, by reason of general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer through the post is expressly or impliedly authorized; (*s*) but this limitation can hardly be of much practical importance.

(*p*) 7 Ch. 587. See, also, *Wells' Case*, 15 Eq. 18.

(*r*) 4 Ex. D. 216, C. A.

(*q*) 1 H. L. C. 381.

(*s*) *Household Fire Insurance Company v. Grant*, 4 Ex. D. at p. 228.

For the same principle, as applied to the posting of a letter *containing an offer*, see *Taylor v. Jones*, 1 C. P. D. 87. And as to the property in a letter and its contents, see *Ex parte Cote*, 9 Ch. 27.]

§ 46. In both the above cases of *Adams v. Lindsell* and *Dunlop v. Higgins* it will be observed that the acceptance of the offer was complete by the posting of the answer *before* the offer was retracted, in accordance with the principle which makes the bargain complete at the moment when *mutual* and *reciprocal* assent has been given. But the language of the court in *Adams v. Lindsell* is broader than was needed for the decision of that case, for it would extend to an offer sent by mail and retracted by posting a second letter, *before the first reached its destination*. This point has not yet been presented directly for decision by our courts: and it will be considered in connection with the American cases referred to at the end of the chapter.

Proposal retracted before letter reaches destination.

[Two recent decisions have now covered the point in question. (t) In *Byrne v. Van Tienhoven*, 5 C. P. D. 344, the defendants, who carried on business at Cardiff, wrote to the plaintiffs at New York offering goods for sale. Their letter was posted on the 1st of October and received by the plaintiffs on the 11th, who accepted the offer by telegram on the same day and also by letter on the 15th. Meanwhile, on the 8th of October, three days previous to the arrival in New York of their letter of the 1st, the defendants wrote a second letter withdrawing their offer. This letter was not received by the plaintiffs until the 20th, several days after they had posted their letter of acceptance. Held, that the notice of withdrawal was too late. In considering the question whether a withdrawal of an offer had any effect until it is communicated to the person to whom it has been sent, Lindley, J., said: "I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings

Proposal must be duly retracted before the letter of acceptance is posted.

Byrne v. Van Tienhoven.

Judgment of Lindley, J.

(t) *Byrne v. Van Tienhoven*, 5 C. P. D. 344. B. D. 346. D. 344, and *Stevenson v. McLean*, 5 Q.

between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. * * * This view, moreover, appears to be much more in accordance with the general principles of English law than the view maintained by Pothier." The learned judge then proceeded to consider the question whether the mere posting of the letter of revocation could be regarded as a communication of it to the plaintiff, and answered it in the negative on the ground that there was no analogy between the two cases of posting a letter of acceptance and one of withdrawal. It is a principle of law that a person who makes an offer by post must be taken to have assented "to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself;" but there is neither principle nor authority to show that the party accepting has assented to treat the posting of a letter of withdrawal in the same way.

But an offer is effectually revoked by the *death* of the party making it; nor is it necessary, it would seem, for the fact of death to be notified to the other party. (u) 11

§ 47. The second proposition submitted in the text, namely, that a party accepting cannot retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received, has not yet been directly decided.

In *Dunmore v. Alexander*, (v) before the Court of Sessions in Scotland, it was held that there was no contract where the letters of acceptance and revocation arrived together. In the English courts, however, the principle is now firmly established that the contract is complete and irrevocable upon the posting of the letter of acceptance. It follows, then, that the acceptor, as well as the proposer, is bound from that time and cannot afterwards escape from his obligation. There are *dicta* to support this view. Lord Blackburn says, in *Brogden v. Metropolitan Railway Company*, 2

(u) Per Mellish, L. J., in *Dickenson v. Dodds*, 2 Ch. D. at p. 475. was held to terminate with the death of the promisor, and his executor was not liable for expenses incurred after the death, though he gave no notice of it. *Browne v. McDonald*, 129 Mass. 66. See *Scruggs v. Alexander*, 72 Mo. 134.

11. Death or insanity of the person making an offer, before its acceptance, revokes it. *Pratt v. Trustees, &c.*, 93 Ill. 475; *The Palo Alto*, Davis 343. A contract, unlimited as to time, to pay the expenses of a niece at a boarding-school, (v) 9 Shaw & Dunlop 190, referred to post p.

Proposal re-
voked by the
death of the
proposer.

Can acceptor
retract before
his acceptance
has been re-
ceived by the
proposer?

*Dunmore v.
Alexander.*

App. Cas. at p. 691, that the acceptor by posting his letter has "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that *each side* is bound." "The moment one man has made an offer," says James, L. J., in *Harris' Case*, 7 Ch. at p. 591, "and the other has done something binding himself to that offer, then the contract is complete, and *neither party* can afterwards escape from it," and this passage was cited with approval by Thesiger, L. J., in *The Household Fire Insurance Company v. Grant*, 4 Ex. D. at p. 219. It is true that the argument *ab inconvenienti* has no weight here as in the case of the withdrawal of an offer. The acceptor may notify the revocation by a letter reaching the proposer at the same time as the letter of acceptance, or by means of a telegram the revocation of the acceptance might be the first intimation to the proposer that his offer had been originally accepted, and in neither case would the proposer sustain any loss or inconvenience from the other party's change of intention. This is the view of Bramwell, L. J.: "The arrival of the letter of acceptance might," he says, "be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding." (x)

Consistently, however, with the view of the finality of the contract consequent upon the posting of the letter of acceptance, a view adopted in a series of cases closing with the decision of the Court of Appeal in *The Household Fire Insurance Company v. Grant* (from which Bramwell, L. J., dissented,) there can be little doubt that the proposition now being considered will, when occasion arises, receive judicial sanction.]

§ 48. Contracts of sale are implied under certain circumstances without any expression of the will or intention of the parties; as where, for example, an express contract has been made, and goods are sent, not in accordance with it, but are nevertheless retained by the purchaser. In such a case a new contract is implied that the purchaser will pay for them their value: as where the purchaser retained 130 bushels of wheat furnished on a contract to supply 250 bushels; (y) and where 152 tons of coal were delivered

(x) See *The Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A., in *Newcombe v. De Roos*, 2 E. & E. 271. (y) *Oxendale v. Wetherell*, 9 B. & C. at p. 235. See, also, per Cockburn, C. J., 386.

and retained on an order for 200 or 300 tons. (z) The rule was fully recognized by Parke, J., in *Read v. Runn*, (a) and was well exemplified in the case of *Hart v. Mills* in the Exchequer, in 1846. 12

In *Hart v. Mills*, (b) the facts were that the defendant ordered *two* dozen of port and *two* of sherry, to be returned if not approved. Plaintiff delivered next day *four* dozen of each. Defendant not being satisfied with the quality, sent back the whole except one bottle of port and one dozen of sherry, with a note, saying: "I should not have been particular about keeping the four dozen if the quality had suited me. I return the four dozen of port, minus one bottle which I tasted; also three dozen of sherry, as neither suit my palate." The plaintiff contended that the defendant was liable for two dozen of each kind, on the ground that the order was entire, and that he could not keep part and reject the rest. Alderson, B., said: "The defendant orders two dozen and you send four; then he had a right

(z) *Richardson v. Dunn*, 2 Q. B. 222.

(a) 10 B. & C. 441; and see *Morgan v. Gath*, 34 L. J., Ex. 165; 3 H. & C. 748.

12. Implied Sales.—Where the vendor delivers only part of the goods sold by him, and they are accepted, he may recover the value on an implied contract, subject to recoupment for damages for breach of contract to deliver the residue. *Bowker v. Hoyt*, 18 Pick. 555; *Morse v. Brackett*, 98 Mass. 207; *Starr Glass Co. v. Morey*, 108 Id. 574; *Goodwin v. Merrill*, 13 Wis. 658; *Begole v. McKenzie*, 26 Mich. 470; *Andre v. Hardin*, 32 Id. 324; *Chapman v. Dease*, 34 Id. 375; *Dermott v. Jones*, 23 How. 220, 2 Wall. 1; *Richards v. Shaw*, 67 Ill. 222; *Shaw v. Badger*, 12 Serg. & R. 275; *Ruiz v. Norton*, 4 Cal. 355; *Booth v. Tyson*, 15 Vt. 515; *Sentell v. Mitchell*, 28 Ga. 196. The recovery cannot exceed either the price or the true value. *Chapman v. Dease*, 34 Mich. 375; *Carter v. McNealey*, 1 Ired. L. 448. But in New York the rule is that on an entire contract of sale there can be no recovery for part delivery. *Kein v. Tupper*, 55 N. Y. 550, 555. In this case *Church, C. J.*, said: "The rule is well settled in this state that upon a contract for the deliver-

ing of a specified quantity of property, payment to be made on delivery, no action will lie until the whole is delivered. The English rule that a recovery may be had for the portion delivered if retained until after the time for full performance (as held in 9 B. & C. 387, and other cases,) has never been adopted but expressly repudiated by the courts of this state. That rule rests on no solid foundation, and it enables courts to alter the terms of contracts as made by parties." But an important modification of the New York doctrine is effected by the recent case of *Avery v. Wilson*, 81 N. Y. 341. In that case it was held that where all of a lot of goods were to be delivered at one time, and the buyer accepted a delivery of part only, he thereby waived the condition precedent of complete delivery, and the vendor could recover for the portion delivered, though he made default as to the residue. Where shingles were ordered, and more were sent than the order called for, the buyer took the amount of his order but refused the excess. *Held*, that he was liable only for such as he had accepted. *Larkin v. Mitchell, &c., Co.*, 42 Mich. 296.

(b) 15 M. & W. 85.

to send back all: he sends back part. What is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?" Held, that the plaintiff could only recover for the thirteen bottles retained on the new contract resulting from his keeping them.

It has been held that a plaintiff may recover, as on an implied contract of sale, from a third person who fraudulently induced him to sell goods to an insolvent purchaser, and then obtained the goods for his own benefit from the purchaser. (c) ^{Implied sale enforced against fraudulent third person.} 13

§ 49. There is also one special case, in which a sale takes place by the operation of certain principles of law, rather than by the mutual assent of the parties, either express or implied. The rule is thus stated in Jenkins, 4th Cent. Ca. ^{Sale implied by recovery in trover, and payment of judgment.} 88: "A in trespass against B for taking a horse, recovers damages: by this recovery and execution done thereon, the property in the horse is vested in B." *Cooper v. Shepherd* (d) was an action in trover for a bedstead. ^{Cooper v. Shepherd.} Plea, a former recovery by plain-

(c) *Hill v. Perrott*, 3 Taunt. 274; *Abbott v. Barry*, 2 B. & B. 369; *Corking v. Jarrard*, 1 Camp. 37; *Clarke v. Shee*, Cowp. 197.

13. It has been held that the owner of goods wrongfully taken may waive the tort, and sue in *assumpsit* for goods sold and delivered. *Hill v. Davis*, 3 N. H. 384; *Floyd v. Wiley*, 1 Mo. 430; *Lebeaume v. Hill*, Id. 643; 2 Greenl. Ev. § 108 Also see *Dalton v. Hamilton* 1 Hannay (N. B.) 422. But it is now the received opinion that the right to waive the tort and sue in *assumpsit* exists only where the goods have been sold by the wrongful taker, in which case the action may be *assumpsit* for money had and received, not for goods sold. *Jones v. Hoar*, 5 Pick. 285; *Ladd v. Rogers*, 11 Allen 209, 212; *Tolan v. Hogeboom*, 38 Mich. 624; *Kelty v. Owens*, 4 Chand. 166; *Johnston v. Salisbury*, 61 Ill. 316; *Dundas v. Muhlenberg*, 35 Penna. 351; *Pearson v. Chapin*, 44 Id. 9; *Gray v.*

Griffith, 10 Watts 431; *Bethlehem v. Perseverance Fire Co.*, 81 Penna. 445; *Kimble v. Carothers*, 81 Id. 494; *Best v. Boice*, 22 U. C. Q. B. 439. In Connecticut it was held that where by a fraudulent arrangement goods were procured by one party on the credit of another, the possessor could not be sued as on a sale but in trover. *Bonnell v. Chamberlin*, 26 Conn. 487. Where an owner of lands warned a woodcutter not to cut on his land, and marked out the line, and the woodcutter cut trees where directed, and it appeared that the owner had mistaken the boundary, and the trees had been cut on his land—*Held*, that he could sustain *assumpsit* for the value of the trees on an implied contract of sale. *Evans v. Miller*, 58 Miss. 120. It is not easy to find here any elements of a contract, but neither was there any tort, the owner having licensed the cutting.

(d) 3 C. B. 266. See, also, *Adams v. Boughton*, 2 Str. 1078, more fully reported

tiff in trover, of the same bedstead, in an action against C, and that the conversion by C was not later than the conversion charged against the defendant, and that C being possessed of the bedstead, sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The court held that this plea averred a *sale* of the bedstead from the plaintiff to C, the vendor of the defendant. On principle, however, it is plain that the recovery in trover would only have this effect in cases where the value of the thing converted is included in the damages recovered. (e)

But an *unsatisfied* judgment in trover does not pass the property, and is a mere assessment of damages on *payment* of which the property vests in the defendant. (f) 14

§ 50. From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent. 15

Assent by
mistake.

in *Andrews* 18; *Holmes v. Wilson*, 10 Ad. & E. 503; *Barnett v. Brandon*, 6 M. & G. 640, note.

(e) See reasoning of the court in *Chinery v. Viall*, 5 H. & N. 288; 29 L. J., Ex. 180.

(f) *Brinsmead v. Harrison*, L. R., 6 C. P. 584, affirmed in *Cam. Scacc.*, L. R., 7 C. P. 547; *Ex parte Drake*, 5 Ch. D. 866, C. A.

14. *Brady v. Whitney*, 24 Mich. 154; *Sharp v. Gray*, 5 B. Mon. 4; *Osterhout v. Roberts*, 8 Cow. 43; *Ball v. Liney*, 48 N. Y. 6, 16; *Marsden v. Cornell*, 62 N. Y. 215, 220; *Thayer v. Mauley*, 73 N. Y. 305, 309. But in Pennsylvania the recovery of the judgment without payment has been held to transfer title. *Floyd v. Browne*, 1 Rawle 121; *Marsh v. Pier*, 4 Id. 236; *Fox v. Northern Liberties*, 3 Watts & S. 103, 107. In this last case *Kennedy, J.*, says: "The authority in this state, so far as we have any evidence of it, seems to be in favor of the principle that the judgment alone in such case transfers the property." See *White v. Philbrick*, 5 Greenl. 147; *Merrick's Estate*, 5 Watts

& S. 17; *Fox v. Prickett*, 34 N. J. L. 13.

15. *Jennings v. Gratz*, 3 Rawle 168; *Gibson v. Pelkie*, 37 Mich. 380; *Sheldon v. Capron*, 3 R. I. 171; *Allen v. Hammond*, 11 Pet. 63; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen 492; S. C., 12 Allen 44; *Hitchcock v. Giddings*, 4 Price 135; *Rice v. Dwight Manufacturing Co.*, 2 Cosh. 80, 86; *Thompson v. Gould*, 20 Pick. 139; *Franklin v. Long*, 7 Gill & J. 467; *Snydam v. Clark*, 2 Sandf. Super. Ct. 133; *Ketchum v. Catlin*, 21 Vt. 191. "The cases founded on mistake seem to rest on this principle—that if parties believing that a certain state of things exist, come to an agreement with such belief for its basis, on discovering their mutual error they are remitted to their original rights." *Ch. J. Savage* in *Mowatt v. Wright*, 1 Wend. 355, 362. *Ketchum v. Bank of Commerce*, 19 N. Y. 499; *Hills v. Snell*, 104 Mass. 173; *Fulleton v. Dalton*, 58 Barb. 236; *Cutts v. Guild*, 57 N. Y. 229; *Barfield v. Price*, 40 Cal. 535, 542; *Baker v. Lyman*, 38 U. C. Q. B. 498. A sale of a drill machine by an administrator was held not to pass

Thus, in *Thornton v. Kempster*, (g) the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell St. Petersburg hemp, and by the buyer to purchase Riga Rhine hemp, a superior article. The broker had made a mistake in describing the hemp to the buyer, and the court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject matter of sale.

Mistake as to
the thing sold.
*Thornton v.
Kempster.*

So in *Raffles v. Wichelhaus*, (h) there was a contract for the sale of "125 bales of Surat cotton, guaranteed middling fair merchants' Dhollerah, to arrive ex *Peerless* from Bombay," and the defendant pleaded to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship *Peerless*, which sailed from Bombay in October, not that which arrived in a ship *Peerless* that sailed in December, the latter being the cotton that plaintiff had offered to deliver. On demurrer, held that on this state of facts there was no *consensus ad idem*, no contract at all between the parties. (i)

*Raffles v.
Wichelhaus.*

[In *Henkel v. Pape* (k) there was a mutual mistake as to the quantity of the thing sold, but as the defendant did not rely on his right to have the contract rescinded, the decision does not involve the application of the principle now being considered.]

Mistake as to
quantity of
thing sold.

In *Phillips v. Bistolli*, (l) the defendant, a foreigner, not understanding our language, was sued as purchaser of some earrings, at auction, for the price of eighty-eight guineas, and alleged in defence that he thought the bid made by him was forty-eight guineas, and that there was a mistake in knocking down the articles to him at eighty-eight guineas, and Abbott, C. J., left it to the jury to find whether the mistake had actually been made, as a test of the existence of a contract of sale. 16

Mistake as to
price.

*Phillips v.
Bistolli.*

valuables secreted in it by the decedent. *Huthmacher v. Harris*, 38 Penna. 491. The sale of a safe on execution passes no title to its contents. *Ray v. Light*, 34 Ark. 421.

(g) 5 Taunt. 786. See, also, *Keele v. Wheeler*, 7 M. & G. 665.

(h) 2 H. & C. 906; 33 L. J., Ex. 160.

(i) See, also, *Smidt v. Tiden*, L. R., 9

Q. B. 446, a mistake as to charter-parties caused by the broker's fraud.

(k) L. R., 6 Ex. 7.

(l) 2 B. & C. 511. See, also, *Cochrane v. Willis*, 1 Ch. 58.

16. Mistake as to Price.—*Rupley v. Daggett*, 74 Ill. 351; *Calkins v. Griswold*, 18 N. Y. Sup. Ct. 208; *Hartford and N. H. R. R. v. Jackson*, 24 Conn. 514; Ro-

§ 51. And so if the parties have expressed themselves in language so vague and unintelligible that the court find it impossible to affix a definite meaning to their agreement, it cannot take effect. Thus, in *Guthing v. Lynn*,^(m) the action was on an alleged warranty on the sale of a horse, and the declaration averred the sale to have been for "a certain price or sum of money, to wit, £63." The proof was of a sale for sixty guineas, and "if the horse was lucky to the plaintiff he was to give £5 more, or the buying of another horse." This was insisted on as a variance. On motion for nonsuit according to leave reserved, the court refused to nonsuit, on the ground that the additional clause was unintelligible; that no man could say under what circumstances a horse was to be considered "lucky," nor could any definite meaning be attached to the words "or the buying of another horse," as part of the price of the horse sold. The contract must therefore be considered as proven for the price of £63, the remainder being looked on as some honorary understanding between the parties.¹⁷

vengo v. Defferari, 40 Cal. 459. In *Greene v. Bateman*, 2 W. & M. 359, a bargain was made for the sale of shingles at \$3.25. One party understood this to mean per bunch and the other per 1000. *Held*, no contract.

(m) 2 B. & Ad. 232. See, also, *Bourne v. Seymour*, 24 L. J., C. P. 207; and *Pearce v. Watts*, 20 Eq. 492, the case of a sale of real estate.

17. Sales Void for Uncertainty.—In *Cummer v. Butts*, 40 Mich. 322, a contract was made to employ an agent to sell on commission, which stipulated that "for good cause this agreement shall be canceled upon sixty days' notice by either party." The court held it impossible to give any definite meaning to the term "for good cause," saying: "It is impossible to say that the wills of the parties concurred and that each meant exactly what the other did, or even to say what either meant." In *Buckmaster v. Consumer's Ice Co.*, 5 Daly 313, the agreement was to sell ice at such price as to yield the seller a profit of not more than \$1 per ton. *Held*, void for uncertainty. In

Whelan v. Sullivan, 102 Mass. 204, a contract for a "piece of land" not otherwise described was held void, parol evidence not being admitted to show what land was meant. In *Adams v. Adams*, 26 Ala. 278, Chilton, C. J., said: "The defendant was to give to Mrs. Adams, his daughter, a 'full share of his property which then and there was worth \$25,000.' Was the share or the whole property worth \$25,000? How was the 'full share' to be ascertained? It is as indefinite as if the defendant had agreed to pay 'a sum of money' without mentioning any amount." See *Sherman v. Kitsmiller*, 17 Serg. & R. 45; *Erwin v. Erwin*, 25 Ala. 236; *Robinson v. Bullock*, 58 Id. 618; *Shakespeare v. Markham*, 72 N. Y. 400.

Illusory Sales.—Where the seller is to make and deliver an article which shall be satisfactory to the buyer, there is no relief for him, if the buyer is not satisfied. In *McCarren v. McNulty*, 7 Gray 139, a book-case was to be made for a society "to the satisfaction of the president." *Merrick, J.*, said: "It may be that the plaintiff was injudicious or in-

§ 52. But an agreement is not to be deemed unintelligible because of some error, omission, or mistake in drawing it up, if the real nature of the mistake can be shown, so as to make the bargain intelligible. Thus, in *Coles v. Hulme*, (n) a bond to pay 7700 was allowed to be corrected by adding the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties.

Mistake or error in written contract may be corrected.

So in *Wilson v. Wilson*, (o) Lord St. Leonards said that "both courts of law and courts of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty;" (p) and his Lordship cited a case in *Douglas* (q) where

Wilson v. Wilson.

discreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief." This case was followed in *Brown v. Foster*, 113 Mass. 136, Devens, J., saying: "Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered." On the authority of the two cases above cited, *Zaleski v. Clark*, 44 Conn. 218, was decided. In this case a bust was to be made by a sculptor to the satisfaction of defendant, who refused to take it, though a fine piece of workmanship. Carpenter, J., said: "A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; an undertaking to make one with which she will be satisfied is quite another thing. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it." See, also, *Gray v. N. J. Cent. R. R.*, 11 Hun 70; *Gibson v. Cran-*

age, 39 Mich. 49. But on the other hand, see the cases of *Manufacturing Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345. In the last case *Redfield, J.*, said: "The contract of the defendant requested plaintiffs to deliver the pans to the defendant, and he agreed to pay them therefor \$80 on the first of July, 'if satisfied with the pans.' We think the ruling of the court that the defendant had no right to say, arbitrarily and without cause, that he was dissatisfied and would not pay for the pans, was sensible and sound. If a man orders a garment made of given material and fashion and promises to pay if satisfied, he cannot say that the garment in material and manufacture is according to the order, and yet refuse to test the fit or pay for it. He must act honestly and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject matter and surrounding circumstances. His dissatisfaction must be actual, not feigned; real, not merely pretended." See *Gray v. N. J. Cent. R. R.*, 11 Hun 70, dissenting opinion of Judge Brady.

(n) 8 B. & C. 568.

(o) 5 H. L. C. 40; and see *Bird's Trusts*, 3 Ch. D. 214; *Burchell v. Clark*, 2 C. P. D. 88, C. A.

(p) 5 H. L. C. at p. 66.

(q) Anonymous, per Buller, J., in *Bache v. Proctor*, Doug. 384.

the condition of a bond declared that it was to be void if the obligor did *not* pay what he promised, and the court struck out the word *not* as a palpable error. And the same principle was established in *Lloyd v. Lord Say and Seale*, (r) in the King's Bench, and affirmed in House of Lords; and in *Langdon v. Goole*: (s) the omitted name of the grantor being supplied by the court in the first case, and that of the obligee in the second. 18

§ 53. But care must be taken not to confound a common mistake as to the subject matter of the sale, or the price, or the terms, which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact, or what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though it may be liable to be avoided for fraud, illegality or other cause; or even though the buyer or the seller may be totally mistaken in the motive which induced the assent. 19

And when the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention. (t) 20

(r) 10 Mod. 46, and 4 Browne's P. C. 73.

(s) 3 Lev. 21.

18. *Marion v. Faxon*, 20 Conn. 486; *Bickford v. Cooper*, 41 Penna. 142; *Cooke v. Graham*, 3 Cranch 229; *Jones v. McIntosh*, 2 Pug. (N. B.) 343; *Sisson v. Donnelly*, 34 N. J. L. 432.

19. *Wheat v. Cross*, 31 Md. 99; *McLean v. Robinson*, 2 P. & B. (N. B.) 83.

(t) Per Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases in notes, 2 Smith's L. C. (ed. 1879) 775; *Cornish v. Abington*, 4 H. & N. 549; 28 L. J., Ex. 262; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J., Ex. 198; *Van Toll v. South Eastern Railway Company*, 12 C. B. (N. S.) 75; 31 L. J.,

C. P. 241; *Carr v. London and North Western Railway Company*, L. R., 10 C. P. 307, per Brett, J.; *Thomas v. Brown*, 1 Q. B. D. 714.

20. So in *Stoddard v. Ham*, 129 Mass. 383, where a manufacturer sold a quantity of brick to a commission merchant, whom he erroneously supposed to be acting as such for the defendant, but who, in fact, bought for himself and sold to the defendant—*Held*, that there was a valid sale and the manufacturer could not treat it as void and recover the brick. *Colt, J.*, said: "A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and un-

A party is estopped from denying that an intention manifested by him was his real intention.

This point is treated under the subject of "estoppel," *post*, Book V., Part I., ch. 2.

§ 54. A mistake by the buyer in supposing that the article bought by him will answer a certain purpose, for which it turns out to be unavailable, is not a mistake as to the subject matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards to rescind it, if the vendor warranted its adaptability to the intended purpose. Thus, in *Chanter v. Hopkins*,^(u) *Ollivant v. Bayley*,^(x) and *Prideau v. Bunnett*,^(y) the purchasers had ordered specific machines from the patentees, and attempted to justify their refusal to pay, on the ground that the machines had totally failed to answer the purpose intended; but it was held that in the absence of a warranty by the vendors, the contract was binding on the purchasers, notwithstanding their mistaken belief that the machines would answer their purpose.²¹

Mistake by
buyer in
motive.

§ 55. In *Scott v. Littledale*,^(z) the vendor made a singular mistake. He sold a hundred chests of tea by a wrong sample. A sale by sample imports, as will be seen hereafter, a warranty by the vendor that the bulk equals the sample. On demurrer to a plea on equitable grounds, setting up this mistake as rendering the contract void for want of mutual assent, the Queen's Bench held that the contract was not void; that if the quality of the bulk was inferior to the sample, the buyer had the right to waive the objection; and the court said: "Possibly a court of equity might have given the defendant some relief, but it certainly would not have set aside the contract." It is worth observing, that in this case the defendant made no mistake as to the subject matter of the contract. He sold the very tea, for the very price, and on the very terms which he intended, but he made a mistake in *giving a warranty* that it was of a particular quality. Now a warranty of quality is not an essential element of a sale, but a collateral engagement attached to

Mistake in
showing wrong
sample.

Scott v.
Littledale.

disclosed intention." See *Hartford, &c., R. R. v. Jackson*, 24 Conn. 514; *Starr Glass Co. v. Longley*, 64 Ga. 576; *Schuchardt v. Allens*, 1 Wall. 359; *Phillip v. Gallant*, 62 N. Y. 256.

(u) 4 M. & W. 399.

(x) 5 Q. B. 288.

(y) 1 C. B. (N. S.) 613.

21. *Dounce v. Dow*, 64 N. Y. 411; *Hight v. Bacon*, 126 Mass. 10; *Deming v. Foster*, 42 N. H. 165; *Simcoe Agr. Soc. v. Wade*, 12 U. C. Q. B. 614.

(z) 8 E. & B. 815; 27 L. J., Q. B. 201; *Megaw v. Molloy*, 2 Ir. L. R., C. P. D. 530, *post*.

or omitted from it, at the pleasure of the parties. (a) The assent to the *sale* was complete; the assent to the *warranty* was given by one of the parties under a mistake, and this mistake might or might not give ground for other relief, but could not prevent the contract from coming into existence.

§ 56. A mistake as to the *person* with whom the contract is made, may or may not avoid the sale, according to circumstances. In the common case of a trader who sells for cash, it can make no possible difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract. But where the identity of the person is an important element in the sale, as if it be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor; (b) or when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price: a mistake as to the person dealt with, prevents the contract from coming into existence for want of assent. ²²

§ 57. In *Mitchell v. Lepage*, (c) in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp, on the ground that he had not contracted with the plaintiff, but with other persons. The broker gave defendant a bought note stating the vendors to be Todd, Mitchell & Co. It

(a) *Chanter v. Hopkins*, 4 M. & W. 399; *Mondell v. Steel*, 8 M. & W. 858; *Foster v. Smith*, 18 C. B. 156.

(b) *Ex parte Barnett*, 3 Ch. D. 123.

22. *Winchester v. Howard*, 97 Mass. 308; *Boston Ice Co. v. Potter*, 123 Mass. 48, stated in the text § 59; *Orcut v. Nelson*, 1 Gray 536, 542; *Gregory v. Wendell*, 40 Mich. 432, 443; *Clark v. Imlay*, 12 N. J. L. 137. Where a broker was employed to buy oil for future delivery, it was held that the buyer was not bound until he accepted the proposed vendor, and therefore the broker could not ratify a sale without disclosing the vendor's name. *Sumner v. Stewart*, 69 Penna. 321. In *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, the plaintiff had delivered ore to defendant on a contract for such delivery to be made by one Chandler.

Van Syckel, J., said: "If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them; or if a person takes up wares from a tradesman without any agreement as to price, the law implies a promise to pay their real value. But if in this case the defendant purchased ore of Chandler, and the plaintiffs, without his knowledge or consent, delivered him their own ore, the relation of vendor and purchaser does not exist between them. After demand of the ore and refusal to return it; or after actual conversion, trover would lie; or after sale of the ore by defendant, the tort might be waived and *assumpsit* maintained."

(c) *Holt N. P.* 253.

turned out that, without the broker's knowledge, that firm had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plaintiff's firm of Mitchell, Armistead & Graabner, the last two taking the place of the withdrawn members of the old firm. Gibbs, C. J., told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. * * * If by this mistake the defendant was induced to think that he had entered into a contract with one set of men, and not with any other; and if, owing to the broker, he has been *prejudiced or excluded from a set-off*, it would be a good defence." Verdict for plaintiff.

§ 58. In *Boulton v. Jones*, (d) the plaintiff had bought out the stock-in-trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, the defendant refused, on the ground that he *had a set-off* against Brocklehurst, and had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action was not maintainable. Pollock, C. B., said: "The rule of law is clear, that if you propose to make a contract with A, then B cannot substitute himself for A without your consent and *to your disadvantage*, securing to himself all the benefit of the contract."

Martin, B., said: "Where the facts prove that the defendant meant to contract with A *alone*, B can never force a contract upon him."

Bramwell, B., said: "It is clear that if the plaintiff were at liberty to sue, it would be *a prejudice to defendant*, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. *And upon that my judgment proceeds*. I do not lay it down, that because a contract was made in one person's name, another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to write a book, or paint a picture, or do any work of personal skill; or

(d) 2 H. & N. 564; 27 L. J., Ex. 117

whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with; that he has written the book, or painted the picture, or supplied the goods."

Channell, B, said: "The case is not one of principal and agent; it was a contract made with B, who had transactions with the defendant and owed him money, and upon which A seeks to sue. Without saying that the plaintiff might not have had a *right of action on an implied contract, if the goods had been in existence*, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them." (d) 23

[In the important case of *Johnson v. Raylton*, (e) it was held by the majority of the Court of Appeal that where goods of a particular description are ordered of a *manufacturer*, who is not otherwise a dealer in them, the contract is to be treated as a *personal* one, and is not fulfilled by the delivery of goods of the same quality as that contracted for, but made by another firm. The buyer in such a case is assumed to have contracted in reliance upon the reputation of the particular firm with whom he deals.

§ 59. The principle of *Boulton v. Jones* has been carried out to its full extent in the case of *The Boston Ice Company v. Potter*, (f) before the Supreme Court of Massachusetts, and the fact that the defendant had or had not a right of set-off against the plaintiff's claim, upon which Bramwell, B., rested his judgment in *Boulton v. Jones*, was treated as immaterial. It appeared that the defendant had previously bought ice of the plaintiffs, but, being dissatisfied with them, contracted to buy it from the Citizens' Ice Company. Subsequently the plaintiffs bought up the business of the Citizens' company, and delivered ice to the defendant without notifying to him that they had purchased the business until after the delivery and consumption of the ice. It was held that the plaintiff company could not maintain an action for the price of the ice. It was endeavored to distinguish *Boulton v. Jones*, upon the ground

(d) See further observations on this case, *post*, Book III., ch. 1.

23. *Mudge v. Oliver*, 1 Allen 74. In this case defendant bought goods on credit from a store whose supposed proprietor was his debtor. Before leaving the store,

however, he was told that the store had changed hands. *Held*, that by going away with the goods he became liable to pay for them, and could not set off his debt.

(e) 7 Q. B. D. 438, C. A., *post*.

(f) 123 Mass. (9 Lathrop) 28.

that there the defendant had a set-off against Brocklehurst, but Endicott, J., in giving judgment, said, at p. 31, referring to *Boulton v. Jones*, "The fact that a defendant in a particular case has a claim in set-off against the original contracting party, shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied *assumpsit* or privity between the parties. Nor can the non-existence of a set-off raise an implied *assumpsit*. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that, because it does not exist, the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it. * * * It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company."

In *Ex parte Barnett* (g) the appellants had executed an order sent to them by an undischarged liquidating debtor, under the mistaken belief that they were dealing with a firm with whom they had had previous business transactions, and whose name resembled that of the liquidating debtor. Held, by the Chief Judge in Bankruptcy, that they were entitled to the goods as against the trustee in the liquidation.]

§ 60. Where a person passes himself off for another, (h) or falsely represents himself as agent for another, for whom he professes to buy, (i) and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the persons thus deceiving him. The contracts in the cases cited below were held void, on the ground of fraud, but they were equally void for mistake, or the absence of the assent necessary to bring them into existence. 24

(g) 3 Ch. D. 123.

(i) *Higsons v. Burton*, 26 L. J., Ex.

(h) *Hardman v. Booth*, 1 H. & C. 803; 342 L. J., Ex. 105; *Lindsay v. Cundy*, 3 App. Cas. 459, reported *sub nom.* *Cundy v. Lindsay*; S. C., 2 Q. B. D. 96, C. A.; and 1 Q. B. D. 348, *post*, chapter on *Fraud*.

342.

24. *Barker v. Dinsmore*, 72 Penna. 427; *Deccan v. Shipper*, 35 Penna. 239; *Moody v. Blake*, 117 Mass. 23; *Downs v. Perrin*, 16 N. Y. 325; *Dean v. Yates*, 22 Ohio St. 388. In this case goods were bought by,

Mistake as to person, caused by fraud.

The effect of mistake in preventing the contract from coming into existence, and therefore from being enforced, is the only branch of the subject that appertains to the formation of the contract. The effect of mistake on the rights of the parties after the contract has been performed or executed, will be considered *post*, Book III., ch. I., *Of Mistake and Failure of Consideration*.

§ 61. The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. If A deliver his horse, on trial, to B, agreeing to take a specified price for him if B approve him after trial, B is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse. Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return" (*k*) are all instances where the assent is conditional. ²⁵ Most of the reported cases, however, have arisen out of disputes as to the *performance* of the conditions, instead of the *formation* of the contract, and the subject can be more intelligibly treated as a whole. The reader is therefore referred to ch. I. of Book IV., Part I., *post*.

Conditional
assent.

"Sale or re-
turn."

CIVIL LAW.

§ 62. The principles of the common law upon the subject embraced in this chapter do not in general differ from those recognized in America and in countries governed by the civil law.

There is, however, one striking exception. The civil law permits what are termed *quasi contracts*, and enforces obligations resulting from them. The *negotiorum gestor*, the man who voluntarily assumed to take charge of another's business in his

Quasi con-
tracts.

one falsely representing himself to be a member of a firm, and were shipped to that firm by express. The fraudulent purchaser obtained them from the express office and sold them. *Held*, that there was no sale. *McIlvaine, J.*, said: "The court very properly and carefully distinguished between a case where the possession is delivered by the owner to a fraudulent purchaser, and a case like the one put in the charge, where the owner did

not deliver or authorize any other person to deliver the goods to the fraudulent vendee."

(*k*) For instances of which, see *Moss v. Sweet*, 16 Q. B. 493; *Ex parte Wingfield*, *In re Florence*, 10 Ch. D. 591, C. A., where it was held that goods sent to a person "on sale or return" do not pass on his bankruptcy under the reputed ownership clause.

25. See § 2, *supra*, note 6.

absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorized interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the creditor's place. The *quasi contract*, in a word, produced the effect of creating obligations *ultra citroque*, in the language of the civilians. These principles of the Roman law still prevail unimpaired over Continental Europe, and are found expressly sanctioned in the French Civil Code, articles 1570–1575. Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbor's enclosure, (l) or furnish food to his cattle, without request, he could maintain an action on the *quasi contract* implied by the law there. At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven. (m) The principle in our law is invariable that no liability can be established against a man by the mere voluntary payment or expenditure of money in his behalf by a third person; that no man can become the creditor of another without the latter's knowledge or assent. It is of course otherwise where the payment is under compulsion or in discharge of a liability imposed on the party paying. (n)

§ 63. The text of the Institutes laying down the principles of the Roman law on this point, was not an innovation but a condensation of the numerous texts of the pre-existing law. "*Igitur cum quis absentis negotia gesserit, ultra citroque inter eos nascuntur actiones quæ appellantur negotiorum gestorum. Sed domino quidem rei gestæ ad-*

(l) Pothier, Obl., §§ 114, 115.

(m) But now, under the new rules of pleading, a simple averment of the request will only suffice where there has been an express request made by the defendant. Where the request is to be implied from the facts and circumstances of the case, those facts and circumstances, so far as material, must be set forth. R. S. C. 1875, Order XIX., rules 4, 27, and see Bullen & Leake Prec. of Plead. (ed. 1882),

p. 279.

(n) *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 610; *Lord Galloway v. Matthew*, 10 East 264; *Durnford v. Messiter*, 5 M. & S. 446; 1 Wm. Saund. 356, note on *Osborne v. Rogers*; *England v. Marston*, L. R., 1 C. P. 529; 35 L. J., C. P. 259. And see a very singular case, *Johnson v. Royal Mail Steam Packet Co.*, L. R., 3 C. P. 38.

versus eum qui gessit, directa competit actio, negotiorum autem gestori, contraria. Quas ex nullo contractu proprie nasci, manifestum est, quippe ita nascuntur istæ actiones, si sine mandato quisque alienis negotiis gerendis se obtulerit; ex qua causa, ii quorum negotia gesta fuerint, etiam ignorantes obligantur." The equity of the law is then stated as follows: "*Idque utilitatis causa receptum est, ne absentium qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quia sane nemo curaturus esset, si de eo quod quis impendisset, nullam habiturus esset actionem.*" (o) Our action for money had and received, to recover back what has been paid by mistake, is one of those that the Roman lawyers considered as arising *quasi-ex-contractu*. "*Item is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur.*" (p) This action was termed *condictio indebiti*. "*Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem, condictitia actio.*" (q)

AMERICAN LAW.

§ 64. In the text-books in America, there has been a singular American law. and almost unanimous attack upon the authority of Cooke v. Oxley, (r) and Professor Bell, in his "Inquiries into Criticisms on the Contract of Sale," also disapproves it, as contrary to the principles of the civil law and of the law of Scotland. (s)

This is the more remarkable, as it is hardly contested that the decisions accord, in the United States at least, with the principles established in the English courts.

Mr. Story, in his treatise on Sales, (t) while citing the American authorities, (u) which are perfectly in accord with the English law on this point, concurs with Professor Bell in the opinion that the rule in Cooke v. Oxley (x) is unjust and inequitable. In his strictures on the decision, he denies that the grant of time to accept the offer is made without consideration. He suggests, as one sufficient legal consideration, the expectation or hope that the offer will be accepted. This appears to be more

Mr. Story's criticism on Cooke v. Oxley.

- (o) Inst., lib. 3, tit. 27, § 1.
- (p) Inst., lib. 3, tit. 27, § 6.
- (q) Inst., lib. 3, tit. 14, § 1.
- (r) 3 T. R. 653.
- (s) Bell's Inq. 27.

- (t) Story on Sales, § 127.
- (u) Eskridge v. Glover, 5 Stew. & Port. 264; Faulkner v. Heberd, 26 Vt. 452; Beckwith v. Cheever, 1 Fost. (N. H.) 41.
- (x) 3 T. R. 653.

fanciful than serious. The hope of A that his offer will be accepted if he gives B time to consider it, is not a consideration moving from B to A, but is the spontaneous emotion of A arising out of his own act; for in the case supposed, B is bound to nothing, does nothing, gives nothing, promises nothing to raise this hope. The second consideration suggested by Mr. Story is, that "the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer." This argument assumes as a fact the exact reverse of the facts alleged in the declaration. It takes for granted that "an inconvenience is *assumed*" by the party to whom the offer is made; and it is precisely on the absence of this consideration that the decision was put, Buller, J., saying: "In order to sustain a promise, there must be *either a damage to the plaintiff*, or an advantage to the defendant, but here was neither."

§ 65. In Kent's Commentaries it is said in the note to page 478 (12th edition), that the "criticisms which have been made upon the case of *Cooke v. Oxley* are sufficient to destroy its authority." (y) Mr. Duer, in his treatise on Insurance, (z) goes still further and says that *Cooke v. Oxley* decides "that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and has been accepted within the limited period; to constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted." If this were indeed the decision, nothing could be more surprising than to find it upheld as sound law by a series of eminent English judges. But *Cooke v. Oxley* has been totally misapprehended by those who have thus criticised it, and there is nothing to warrant the suggestion that it is misreported, or that Bayley, J., stated it to be misreported in the observations made by him in *Humphries v. Carvalho*. (a) It is difficult to see how the case *could* be misreported, for it was a motion in arrest of judgment, which presents the question exactly as on a general de-

Editor of
Kent's Com-
mentaries.

Mr. Duer.

Review of the
criticisms.

(y) Other American decisions in which the authority of *Cooke v. Oxley* is impugned are *Boston and Maine Railroad v. Bartlett*, 3 Cush. 224; *McCulloch v. Eagle Ins. Co.*, 1 Pick. 281; and *Hal-*

lock v. Commercial Ins. Co., 2 Dutcher 268.

(z) Vol. I., p. 118.

(a) 16 East 45.

murrer, (b) and was decided on the ground that the declaration, which is copied in the report, showed no cause of action. An examination of it shows that the plaintiff alleged—First, an offer by the defendant to sell at a certain price; Second, a promise to leave the offer open till four o'clock, *if plaintiff would agree to purchase, and would give notice to the defendant before the hour of four o'clock*; Third, that the plaintiff did agree, and did give notice *before four o'clock*. There was *no allegation that the defendant actually left the offer open till four o'clock, but only that he promised to do so*. The plaintiff's action was tested by the court on two theories—First, that it was for a breach of promise to leave the offer open; or, secondly, that it was for a breach of a contract, that became complete by the plaintiff's acceptance of an offer that had actually remained open. On the first theory, it was held that the declaration was insufficient, because it alleged no consideration for the *promise*. On the second theory, it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The court did not decide that the contract would not have been completed if the offer, *remaining open*, had been accepted; but that nothing showed that the offer was open when accepted. Lord Kenyon, C. J., construed the declaration as proceeding on the first theory, that is, breach of promise to keep the offer open, and he said that this promise was *nudum pactum*. Buller, J., took both grounds, saying that the promise in the morning was without consideration; and that it was *not stated* that the defendant agreed afterwards, or even that the goods were kept; in other words, that the plaintiff had not *alleged* a binding legal promise in the morning, nor a complete contract in the afternoon; and Grose, J., also said that the defendant was not bound before four o'clock, and *it is not stated* that they came to a subsequent agreement.

That this was really the decision is shown by what was said by Mr. Justice Bayley in *Humphries v. Carvalho*, (c) which is strangely construed by Mr. Duer into an assertion that *Cooke v. Oxley* was misreported. This is the language: "The question in *Cooke v. Oxley* arose upon the record, and a writ of error was afterwards brought upon the judgment of this court, by which it appears that the objection made was, that there was only a proposal of sale by the one

(b) *Collins v. Gibbs*, 2 Burr. 899; (c) 16 East 45.
Bowdell v. Parsons, 10 East 359.

party, and *no allegation* that the other party had acceded to the contract of sale."

§ 66. Both the learned American authors, Mr. Story and Mr. Duer, refer to *Adams v. Lindsell*, (d) as overruling *Cooke v. Oxley*, the latter writer saying that "its authority is directly overthrown" by *Adams v. Lindsell*. Certainly the King's Bench did not in this last case say a word in disparagement of *Cooke v. Oxley*; and when this very point was urged by counsel in *Routledge v. Grant*, (e) Best, C. J., pointed out that there was no conflict between the cases, for *Adams v. Lindsell* proceeded expressly on the ground that a treaty by correspondence through the post rested on exceptional principles, because the separation of the parties prevented assent at the same instant, and *ex necessitate rei*, some point of time must be fixed when the contract should be considered complete; for otherwise, the interchange of letters would go on *ad infinitum*. The court was therefore driven to determine either that no contract was possible by correspondence between distant parties, or to fix some point at which the contract became perfect. The rule adopted was in entire accordance with sound principle, and declared that the offer by letter was a continuing offer in contemplation of law until it reached the other party, so that when an answer of acceptance was placed in the post, addressed to the party making the offer, the *aggregatio mentium*, the mutual assent was complete. But in *Cooke v. Oxley*, it did not appear that this mutual assent ever took place. There was no *continuing offer* till four o'clock, but only a *promise* to continue it, not binding for want of consideration. The court held that Oxley had a right to retract, up to the moment when Cooke announced his assent to the offer. So the court would no doubt have held in *Adams v. Lindsell*, that the latter had a right to retract up to the moment when Adams accepted; but Lindsell's withdrawal of his offer, and resale of the wood, occurred *after acceptance*, though he was ignorant of the fact of acceptance. In a word, Oxley withdrew his offer *before acceptance*, Lindsell *after acceptance*, and the contract was held incomplete in the former case and complete in the latter, both decisions being consistent applications of one and the same principle, namely, that a contract becomes complete only when the mutual assent of the parties concurs at the *same moment of time*; and that no number of *alternate* offers and withdrawals, refusals and acceptances, can ever suffice to conclude a bargain.

(d) 1 B. & Ald. 681.

(e) 4 Bing. 653.

- To these remarks may be added the fact that in 1829 the King's Bench decided *Head v. Diggon* (f) on the authority of *Cooke v. Oxley*, without any intimation that it had been overruled, and in accordance with the point really decided in that case. (And see *ante* §§ 42, 43.)

§ 67. In an American case (g) the principle under discussion received a further illustration. The defendant wrote an offer to carry for the plaintiffs "not exceeding 6000 tons gross, in and during the months of April, May, June, July and August, 1864, upon the terms and for the price hereinafter specified," and on the next day the plaintiffs answered, "We assent to your agreement and will be bound by its terms." Held to be no binding contract, because the plaintiffs were not bound to furnish anything for carriage; that the offer was a mere promise of an *option* to them, for which promise no consideration was given, and that the defendant had the right to withdraw from his offer at any time before such an acceptance as imposed *some* obligation on the company as a consideration; the acceptance would have been good, if the company had agreed to furnish *any* specified quantity not exceeding the 6000 tons, but not otherwise, because the defendant could not be bound while the plaintiffs were left free.

§ 68. On the questions of the mode of completing a bargain by correspondence, the American authorities are not only in accordance with the decisions of our own courts, but they have gone further, and covered the point left undecided in *Adams v. Lindsell*, though included in the *dicta*.²⁶

In *Mactier's Adm's v. Frith*, (h) the Court of Errors of New York decided, after a full review of the authorities, that where the dealing is by correspondence, "the acceptance of a written offer of a contract of sale consummates the bargain, *provided the offer is standing at the time of the acceptance.*"

The point was still left open as to the effect of a revocation of the offer not communicated to the party accepting at the time of acceptance.

§ 69. In the more recent case of *Tayloe v. Merchants' Fire Insur*

(f) 3 M. & R. 97. Witham, L. R., 9 C. P. 16, *ante* § 48.
 (g) *Chicago and Great Eastern Railway Co. v. Dana*, 43 N. Y. (4 Hand) 240; 26. See *supra*, § 44, note 10.
 (h) 6 Wend. 104; *Batteman v. Morford*, 76 N. Y. 622.

ance Company, (i) the Supreme Court of the United States has closed this last point in America, by holding that under such circumstances, "an offer prescribing the terms of insurance is intended and is to be deemed a valid undertaking by the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and *that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.*" Although this decision was given on an insurance contract, the reasoning of the court was quite applicable to all other bargains between parties. Nelson, J., who delivered the opinion, said: "On the acceptance of the terms proposed, transmitted in due course of mail to the company, the minds of both parties have met on the subject, *in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed, has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for *their* approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would *defeat the object which both had in view in entering upon the correspondence.* * * *

Taylor v. Merchants' Fire Insurance Company.

"The fallacy of the opposite argument, in our judgment, consists in the assumption that the contract cannot be consummated without a *knowledge* on the part of the company that the offer has been accepted. * * * But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. * * * The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor for the same reason can the meeting of the

(i) 9 How. Sup. Ct. 390; approved by 5 C. P. D. 344, 347. *Lindley, J., in Byrne v. Van Tienhoven,*

minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of *some* interval of time, and if the process is to be carried further, in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other."

§ 70. The civilians do not accord with these views. Pothier says :

Civilians, on
contracts by
correspond-
ence.

Pothier.

"If I write to a merchant of Leghorn a letter, in which I purpose to purchase of him a certain quantity of merchandise at a certain price, and before my letter can have reached him I write a second letter withdrawing my proposal, although the merchant of Leghorn, in ignorance of the change of my intentions, answers that he accepts the proposed bargain, yet there is no contract of sale between us; for my intention not having continued until the time at which my letter was received, and my proposal accepted, the assent or concurrence of our wills necessary to form a contract of sale has not occurred. It must be observed, however, that if my letter causes the merchant to be at any expense in proceeding to execute the contract proposed, or if it occasion him any loss, as, for example, if in the intermediate time between the receipt of my first and that of my second letter, the price of the merchandise falls, and my first letter has made him miss the opportunity to sell it before the fall of the price; in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity that no person shall suffer for the act of another: *Nemo ex alterius facto prægravari debet*. I ought, therefore, to indemnify him for the expense and loss which I occasion by making him a proposition which I afterwards refused to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, ships for my account and forwards the merchandise, though in that case there has not properly been a contract of sale between us, yet he will have a right to compel me to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned." (k)

(k) Pothier, *Contrat de Vente*, No. 32, Pothier's opinion is stated not to be in accordance with English law.
and see the judgment of Lindley, J., in
Byrne v. Tienhoven, 5 Q. P. D. 344, where

§ 71. It is impossible to read the reasoning of this eminent jurist in the passages just cited, without feeling that it fails to meet the difficulties of the case. He places the proposer ^{Not satisfactory.} in the instances suggested under all, and more than all, the obligations of a purchaser, while insisting that he has made no purchase. The ground suggested, that it is the act of the proposer which causes damage to the other, and thus imposes an equitable obligation to repair that damage, is a *petitio principii*. *Ex hypothesi*, the party receiving the offer knows that it may legally be retracted by a second letter despatched to him before his acceptance, and he accepts subject to this risk. If, therefore, before waiting the time necessary to learn whether the offer had been actually retracted at the date of his acceptance, he incurs expense or loss in a premature attempt to execute a non-existent contract, surely it is his own precipitancy, and not his correspondent's conduct, which is the real cause of the damage. So, too, if there be a fall in the market, on what ground is he entitled to make his correspondent suffer the loss, when plainly in the contrary event the profit would accrue to himself? To make a mere negotiation not resulting in a bargain operate so as to place the proposer *in duriori casu* than he would be if bound by a perfect contract; to render him liable for a fall in the market without the correlative chance of profit from a rise, is a proceeding which fails to awaken a response from that sense of equity to which Pothier appeals; and notwithstanding the imposing authority of his name, it may be doubted whether the doctrine thus propounded would stand the test of discussion at the bar of a tribunal governed even by the civil law. (1)

§ 72. Both the common and the civil law, however, concur in relation to the case where an order for purchase or sale is transmitted by correspondence to an *agent* of the writer. ^{Common and civil law as to order for purchase by correspondence.} If A, in Liverpool, order his correspondent, B, in New York, to purchase a cargo of flour for account of A, and B execute the order before receiving a countermand, A remains bound, even though he may have posted the countermand before the execution of the order. The civil law is express on this point: "*Si mandassem tibi ut fundum emereres, postea scripsissem ne emereres, tu antequam scias me vetuisse, emisisses, mandati tibi obligatus ero, ne damno*

(1) Mr. Story is of a contrary opinion, fairest and most intelligible rule that can and lands this doctrine as "by far the best found." § 130, note.

afficiatur is qui mandatum suscepit." Dig. L. 17, tit. 1, § 15. The contract here is one of agency, not of sale, and is governed by totally different principles; for in agencies, a revocation of authority by the principal cannot take effect till it reaches the agent. (m)

§ 73. But although this is a different contract, the analogy is very strong between it and a bargain and sale by correspondence. If A send an agent to B with a proposal for sale, even the civilians admit that A cannot revoke the authority of the agent to make the offer until the revocation reaches him. So that if A despatched C with an order recalling the authority, even before the agent had made the offer, A would still remain bound by a bargain made before C's arrival with the countermand. Why should there be any difference when the proposer sends his proposal by the public post, which he authorizes to deliver it? A, by sending a letter from London, addressed to B in Manchester, really gives to the public post authority to hand to B a written offer, and to receive an answer in behalf of A. Even on the doctrines of the civil law, it would seem to be permissible under such circumstances to hold that A's revocation comes too late, if it only arrives after the completion of the bargain thus authorized to be made in his behalf. In reality the true theory of the case seems to be that an offer sent by mail is an authority to the party to whom it is sent to bind the sender by acceptance, and includes an implied promise that no revocation is to take effect till received by the agent.

§ 74. The cases that arise in attempts to contract by correspondence present at times very singular complexity. In *Dunmore v. Alexander*,^{v. Alexander,} (n) the party to whom the proposal was

(m) Story on Agency, § 470, (9th ed.) Per Bayley, J., in *Salte v. Field*, 5 T. R. 215. A revocation by the death of the principal operates instantly at common law. (See cases in note to *Smart v. Sanders*, 5 C. B. at p. 917.) By the civil law, acts done by the agent while ignorant of the principal's death are valid, unless the other contracting party knew of the death. Dig. L. 17, tit. 1, L. 26, 58. The French code is to the same effect. Acts 2008-9. The Bank of England protects itself against the risk resulting from the common law rule by special clauses in its forms for powers of attorney. *Kiddell v. Farnell*, 26 L. J., Ch. 818. By §

81, subs. 3 of the merchant shipping act, 1854, (17 and 18 Vict., c. 104,) no sale of a ship *bona fide* made by an agent under a certificate of sale to a purchaser for valuable consideration shall be impeached by reason of the death of the principal before the making of the sale. By 22 and 23 Vict., c. 35, § 26, trustees, executors and administrators are discharged from liability in respect of payments made *bona fide* to an agent whose principal is dead, but whose death is at the time unknown.

(n) 9 Shaw & Dunlop 190. See *ante* § 47.

made, wrote and posted a letter of acceptance; and then wrote and posted a letter recalling the acceptance, and *both letters reached the proposer at the same time*. The majority of the Court of Sessions in Scotland held that there was no contract, reversing the judgment of the lower court; and a very similar case is cited by Merlin, Repert., tit. Vente, § 1, art. 3, no. 11, where an offer was sent by letter to buy goods on certain conditions. The offer was accepted by letter, but by a subsequent letter the unconditional acceptance was recalled, the writer proposing some modifications in the conditions. Both letters reached the original proposer together, and he declined to execute the contract. It was held that the proposer could not be forced to perform the bargain, the second answer to his proposal authorizing him to consider the acceptance as withdrawn.

§ 75. In the case of *M'Culloch v. The Eagle Insurance Company*, (o) A wrote to ask B on what terms he would insure a vessel. B wrote on the 1st of January that he would insure at a specified rate, and on the 2d of January wrote a letter retracting his offer. A had written an acceptance of the offer before receiving the second letter, *but after B had posted the second letter*, and it was held that there was no contract; but this case is disapproved by the American text-writers, and is in conflict with the decision of the Supreme Court of the United States in *Taylor v. Merchants' Fire Insurance Company*, cited *ante* § 69. 27

*M'Culloch v.
Eagle Insurance
Company.*

(o) 1 Pick. 283. And in *Hallock v. England* and in this country;" and the Commercial Insurance Company, 2 Dutch. 268, 283, Vredenburg, J., referring to *M'Culloch v. The Eagle Insurance Company*, says: "This case is against the principle of the decision is directly controverted in the two cases recently before the English courts which have been already referred to, *ante* § 46. whole current of authorities, both in 27. See § 44, *supra*, note 10.

CHAPTER IV.

OF THE THING SOLD.

	SEC.		SEC.
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§ 76. As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows, that if at the time of the contract the thing *has ceased to exist*, the sale is void.¹

A thing which has ceased to exist.

In *Strickland v. Turner*, (a) a sale was made of an annuity dependent upon a life. It was afterwards ascertained that the life had already expired at the date of the contract, and not only was the sale held void, but *assumpsit* by the purchaser to recover back the price paid as money had and received was maintained.

Strickland v. Turner.

In *Hastie v. Couturier*, (b) a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 21st of the preceding month of April; held, that the sale of the 15th of May was properly repudiated by the purchaser.

Hastie v. Couturier.

§ 77. These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold; sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground,

1. *Franklin v. Long*, 7 Gill & J. 407; *Willis*, 1 Ch. 58; 35 L. J., Ch. 36; *Smith Allen v. Hammond*, 11 Pet. 63, 71; *Gibson v. Pelkie*, 37 Mich. 380; *Kaufman v. Hyde*, 37 Id. 123; *King v. Doolittle*, 38 Tenn. 77, 87; *Thompson v. Gould*, 20 Pick. 134, 139. *Willis*, 1 Ch. 58; 35 L. J., Ch. 36; *Smith v. Myers*, L. R., 5 Q. B. 429; 7 Q. B. 139, in error. (b) 9 Ex. 102, and 5 H. L. C. 673, reversing the judgment in 8 Ex. 40. See, also, *Barr v. Gibson*, 3 M. & W. 390.

(a) 7 Ex. 208. See, also, *Cochrane v.*

is rather, that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact, was really no assent, there was no subject matter for a contract, and the contract was therefore never completed. This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase, turned out to be for six years instead of eight and a half; and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than that offered by the vendor. (c) This is also the opinion of the civilians. Pothier (d) says: "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words: "There is no valid assent, where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

§ 78. In relation to things *not yet in existence*, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be *sold*, while the other can Things not yet in existence, or not yet acquired by vendor. only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold, are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, (e) and the sale is valid. ² But he can only make a *valid agreement to sell*,

(c) *Farrar v. Nightingale*, 2 Esp. 139.

(d) *Contrat de Vente*, No. 4.

(e) 14 *Viner's Ab.*, tit. Grant, p. 50; *Shep. Touch.*, Grant, 241; *Perk.*, §§ 65, 90; *Grantham v. Hawley*, Hob. 132; *Wood and Foster's Case*, 1 Leon. 42; *Robinson v. Macdonnel*, 5 M. & S. 223.

2. A sale of a crop while growing in the field, to be delivered in the future, is a present sale. *Sanborn v. Benedict*, 78

Ill. 309. So is the sale of an unborn colt. *McCarty v. Blevins*, 13 Tenn. 195. In *Thrall v. Hill*, 110 Mass. 328, the lessee put furniture into the leased premises under an agreement that it should become the property of the lessor at the end of the term. *Held*, that the lessor had an interest in the furniture which he could sell before the end of the term. *Morton, J.*, said that the lessor "had a vested interest

not on actual sale, where the subject of the contract is something to be afterwards acquired, (*f*) as the wool of any sheep or the milk of any cows, that he may buy within the year, or any goods to which he may obtain title within the next six months.³ This distinction involves very important consequences, as will be pointed out hereafter.

which would ripen into a perfect title by the lapse of time. It is true that a man cannot sell personal property in which he has no interest. A mere possibility, coupled with no interest, is not the subject of sale, and would not pass by a bill of sale. But if he has a present interest in the property sold, a sale of it is valid." The sale of an outward cargo transfers title to the proceeds, whether money or goods. *Hodges v. Harris*, 6 Pick. 359; *Pratt v. Parkman*, 24 Pick. 42. In *Conderman v. Smith*, 41 Barb. 404, a mortgage of butter and cheese, "to be made this season," was held valid, the mortgagor being possessed of the cows at the time he made the mortgage.

(*f*) Per Mansfield, C. J., in *Reed v. Blades*, 5 Taunt. 212, 222.

3. *Noyes v. Jenkins*, 55 Ga. 586; *Wilson v. Wilson*, 37 Md. 1; *Head v. Goodwin*, 37 Me. 181; *Whitehead v. Root*, 2 Metc. (Ky.) 584. In *Low v. Pew*, 108 Mass. 347, there was an agreement by the proprietors of a fishing schooner in the form of a present sale of all the halibut that may be caught by the crew of a certain vessel on a certain voyage. The proprietors became bankrupt before the vessel returned. The buyer and the assignee both claimed the fish. It was held that the sale passed no title. *Morton, J.*, said: "A mere possibility or expectancy of acquiring property not coupled with any interest does not constitute a potential interest in it. The seller must have a present interest in the property of which the thing sold is the product, growth or increase." "In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut,

but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish, and that the sale to the plaintiffs was void." A transfer by a tenant of a farm to his landlord of all the crops that may be grown upon the land during the lease is valid. *Bellows v. Wells*, 36 Vt. 599; *Butt v. Ellett*, 19 Wall. 544; *Smith v. Atkins*, 18 Vt. 461; *Headrick v. Brattain*, 63 Ind. 438; *Andrew v. Newcomb*, 32 N. Y. 417; *Van Hoozer v. Cory*, 34 Barb. 9. These cases, however, were all transfers to the owner of the land and are sustained on that ground. In *Andrew v. Newcomb*, *Denio, C. J.*, said: "The owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest." In *Gittings v. Nelson*, 86 Ill. 591, an agreement by a tenant before a crop was planted to give his landlord a lien upon it for the rent of other property, was held invalid. This case hardly accords with the foregoing, which rest upon the theory that the owner of the farm reserved title to its produce so that the tenant never acquired it. Thus in *Heald v. Builders' Ins. Co.*, 111 Mass. 38, the tenant agreed not to sell hay, but to feed it all out upon the farm, and it was decided that the tenant had no title to the hay. A mortgage of goods which the mortgagor may afterwards acquire is void at law against subsequent attaching creditors. *Moody v. Wright*, 13 Metc. 17; *Jones v. Richardson*, 10 Metc. 481; *Looker v. Peckwell*, 38 N. J. L. 253, affirmed, 39 N. J. L. 134; *Hamilton v. Rogers*, 8 Md. 301; *McCaffrey v. Woodin*, 65 N. Y. 459; *Cummings v. Morgan*, 12 U. C. Q. B. 565.

(Book II.) For the present it suffices to say, that in an actual sale, the property passes, and the risk of loss is in the purchaser, while in the agreement to sell, or executory contract, the risk remains in the vendor.

§ 79. The leading modern case on the subject is *Lunn v. Thornton*, (g) decided in 1845. The action was *trover* for bread, flour, &c. The plaintiff, in consideration of a sum lent to him, ^{Lunn v. Thornton.} had by deed-poll covenanted that he "sold and delivered unto the defendant all and singular his goods, household furniture, &c., then remaining and being, or *which should at any time thereafter remain and be in his dwelling-house, &c.*" Tindal, C. J., in delivering the opinion of the court, said, "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else: and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." *Held*, in the negative. Subsequent cases are to the same effect. (h)

§ 80. But though the actual *sale* is void, the agreement will take effect if the vendor, by some act done after his acquisition of the goods, clearly shows his intention of giving effect to the original agreement, or if the vendee obtains possession under authority to seize them. This modification of the rule is recognized in the cases just cited, and rests originally on the authority of the fourteenth rule in Bacon's *Maxims*: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu.*"⁴

(g) 1 C. B. 379.

(h) *Gale v. Burnell*, 7 Q. B. 850; *Con- greve v. Evetts*, 10 Ex. 298, and 23 L. J., Ex. 273; *Hope v. Hayley*, 5 E. & B. 830, and 25 L. J., Q. B. 155; *Chidell v. Gallsworthy*, 6 C. B. (N. S.) 471; *Allatt v. Carr*, 27 L. J., Ex. 385. See, also, *Moakes v. Nicholson*, 34 L. J., C. P. 273; 19 C. B. (N. S.) 290.

4. *Brown v. Combs*, 63 N. Y. 598; *Gittings v. Nelson*, 86 Ill. 591; *Head v. Good-*

win, 37 Me. 182; *Dalton v. Landahn*, 27 Mich. 529; *Calkins v. Lockwood*, 16 Conn. 276; *Phelps v. Murray*, 2 Tenn. Ch. 746, 753. This subject was discussed in the case of *McCaffrey v. Woodin*, 65 N. Y. 459, and it was held that a transfer of property to be afterwards acquired would operate as a license to take possession, and when possession was taken would operate as a transfer. "At law a mortgage upon property not yet acquired is, according to

See *Brown v. Bateman*, L. R., 2 C. P. 272, where the bargain was in relation to such materials as might be subsequently brought upon the premises under a building contract.

§ 81. It is well to observe that in equity a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are required, to the vendee. The whole doctrine with its incidents, both at common law and in equity, was twice argued, and thoroughly discussed and settled, in the case of *Holroyd v. Marshall*,⁽ⁱ⁾ where Lord Westbury and Lord Chelmsford gave elaborate opinions, concurred in by Lord Wensleydale, although his Lordship's first impressions had been adverse to their conclusions. The Barons of the Exchequer held, however, in *Bolding v. Reed*, 3 H. & C. 955; 34 L. J., Ex. 212, that the doctrine of *Holroyd v. Marshall* only applies to subsequently-acquired property when so specifically described as to be identified.⁵

§ 82. In relation to executory contracts for the sale of goods not yet belonging to the vendor, Lord Tenterden held, in an early case (*k*) at Nisi Prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, is not a valid contract, but a mere wager on the price of the commodity. But this doctrine is quite exploded, and *Bryan v. Lewis* was expressly overruled by the Exchequer of Pleas in *Hibblewhite v.*

the authorities, only a license until a new act intervenes." Dwight, Com'r, in *McCaffrey v. Woodin*. See *Chynowith v. Tenney*, 10 Wis. 397; *Cressey v. Sabre*, 17 Hun 120.

(i) 10 H. L. C. 191. And see judgment in *Reeves v. Whitmore*, 33 L. J., Ch. 63, as to distinction between a present transfer of future property, and a mere power to seize it.

5. *Mitchell v. Winslow*, 2 Story 644; *Apperson v. Moore*, 30 Ark. 56; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Butt*

v. Ellett, 19 Wall. 544. But in *Phelps v. Murray*, 2 Tenn. Ch. 746, Chan. Cooper holds that equity will not enforce a mortgage upon goods acquired after the making of the mortgage and purporting to cover all additions to stock. "The contract is invalid at law and not enforceable in equity." *Holroyd v. Marshall*, cited in the text, is followed. See a full discussion, also, in *Brett v. Carter*, 2 Low. 458, and see note 7 to this chapter.

(k) *Bryan v. Lewis*, Ry. & Moo. 386, in 1826.

McMorris, (l) and Mortimer v. McCallan, (m) after being questioned in the Common Pleas in Wells v. Porter. (n) ⁶

The law in relation to time bargains for the sale of chattels not belonging to the vendor, when merely colorable devices for gambling in the rise and fall of prices, is treated *post*, Book III., ch. III.

§ 83. In America it has been decided, that if a vendor sell a thing not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser. (o) ⁷ So in a contract of "sale or return," where the vendor had no title at the time of sale, but acquired one afterwards, before the time limited for the return; held,

In America
executory
agreement be-
comes exe-
cuted as soon
as vendor
acquires title.

(l) 5 M. & W. 462.

(m) 6 M. & W. 58.

(n) 2 Bing. N. C. 722, and 3 Scott 141.

6. Clarke v. Foss, 7 Biss. 541; Wolcott v. Heath, 78 Ill. 433; Pixley v. Boynton, 79 Ill. 351; Logan v. Musick, 81 Ill. 415; Whitehead v. Root, 2 Metc. (Ky.) 584. But see Kirkpatrick v. Bonsall, 72 Penna. 155, which holds that whether a contract is a *bona fide* transaction or a mere gambling contract is a question of fact. "A contract, legal on its face, may become an instrument of illegal and ruinous schemes, injurious to the community and contrary to the highest policy of the state." See, also, Lyon v. Culbertson, 83 Ill. 33; In re John Green, 7 Biss. 338. The owner of goods may make a valid sale of them, although in the possession of one who has wrongfully taken them. See § 6, note 1, *supra*. And one who has hired a chattel with the privilege of purchase may make a mortgage upon it, which will be a valid lien on such interest as he has. Chase v. Ingalls, 122 Mass. 381.

(o) Frazier v. Hilliard, 2 Strobb. 309; Blackmore v. Shelby, 8 Humph. 439. But the prevailing American doctrine on this subject seems to be essentially the same as the English one. See Story on Sales, § 186, and cases cited in the notes.

7. The two cases cited hardly bear out this proposition, and it is probably not

correct, except where the seller has actually delivered possession of the goods, as in Hotchkiss v. Oliver, next cited by our author, in which case the implied warranty of title operates as an estoppel. In Frazier v. Hilliard there is a *dictum* which accords with the text, but Blackmore v. Shelby only decides that a man may make an executory contract to sell what he does not yet own. The following cases show the substantial accord of American with English law on this point.

Sale of an Expectancy at Law.—In Wheeler v. Wheeler, 2 Metc. (Ky.) 474, it was held that a sale by a son of all his interest in the estate of his father, who was living, passed no title either then or on the death of the father. To the same effect, see Needles' Ex'r v. Needles, 7 Ohio St. 432.

Sale of an Expectancy in Equity.—Equity will give effect to a sale of an expectancy, as an agreement to convey, if no undue advantage was taken. In Stover v. Eycleshimer, 4 Abb. (N. Y.) App. Dec. 309, a son transferred the interest he then had or might thereafter have in the estate of his father (then living), to be applied to pay a debt due grantee from grantor. The court said that the grantor had no interest in his father's estate which could be the subject of a grant, and the instrument containing no warranty could not

that the buyer who had allowed the time to elapse without returning the thing sold, could not set up the failure of consideration in the original contract, as a defence in an action for the price. (p)

§ 84. The civilians held that an expectation dependent on a chance may be sold, and the illustration usually given is that of the fisherman who agrees to sell a cast of his net for a given price; (q) and this is adopted by Mr. Story. (r)

Sale of a hope dependent on a chance.

Venditio spei.

The illustration is perhaps not very well chosen. The case supposed is rather one of work and labor done, than of sale. The fisherman owns nothing but the tools of his trade, i. e., his net. What is in the sea is as much the property of anybody else as of himself. If a third person gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who

operate as an estoppel, and did not effect a transfer of the legal title. Nevertheless, "If it was such an interest as a court of equity would enforce on the decease of the ancestor, it was effectual for the respondent's purpose. That it was such seems to me undeniable." "It is true Judge Cowen remarks in *Munsell v. Lewis*, 4 Hill 635, 642, that he was of the opinion that a simple expectancy in which the assignor had no interest, and which is unpurchasable, can neither be assigned nor would a contract for future assignment be valid. These remarks, however, without qualification, can hardly be deemed sound law to-day, for in *Field v. Mayor, &c.*, of New York, 6 N. Y. 179, it was held that an assignment for a valuable consideration, of demands having at the time no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence." See, further, *Fitzgerald v. Vestal*, 4 Sneed 258; *Martin v. Marlow*, 65 N. C. 695. On the same principle a release by a son to his father of all

future interest as heir, or an agreement between prospective heirs as to the future estate, has been sustained. See *Powers' Appeal*, 63 Penna. 443, 445. Read, J., said: "We have direct and positive authority in two cases in Massachusetts, *Quarles v. Quarles*, 4 Mass. 680, which is expressly re-affirmed in *Kenney v. Tucker*, 8 Mass. 143, where it was held that 'where a child, in consideration of a sum paid by his father by way of advancement, releases his claim to his share of the inheritance, although it may appear that the sum so paid was much less than his purparty of his father's estate at his death would have been worth, it shall bar him of his share or purparty.'"

(p) *Hotchkiss v. Oliver*, 5 Denio 314.

(q) Dig. L. 8, § 1, de Contr. empt. Pothier, Vente No. 6.

(r) Story on Sales 191. But *Low v. Pew*, 108 Mass. 347, appears to be a direct decision to the contrary. There it was held that a contract to sell fish which might afterwards be caught did not vest the property in the fish, when caught, in the purchaser.

paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labor in fishing for an employer. It is no more a contract of sale when he is paid by the job or piece, for a single cast, than when he is paid by the month for all his casts. (s) But though the illustration may be questioned, the rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the purchaser to pay the price, even if no pearls were found; for as was said by Lord Chief Baron Richards, in *Hitchcock v. Giddings*, (t) "If a man will make a purchase of a chance, he must abide by the consequences." (u) 8

The rules of law applicable to the sale of things immoral, noxious, or illegal, are discussed *post*, Book III., ch. III., on Illegality.

(s) The vexed subject of the true test by which to determine whether certain contracts are in their nature contracts of sale, or contracts for work and labor, and materials furnished, is discussed *post*, Part II., ch. I.

(t) 4 Price 135.

(u) See, also, observations of Lord Campbell, C. J., in *Hanks v. Pulling*, 6 K. & B. 659; 25 L. J., Q. B. 375.

8. The route of a newspaper carrier

may be the subject of sale, (*Hathaway v. Bennett*, 10 N. Y. 108,) or the good will of a business, (*Boon v. Moss*, 70 N. Y. 465,) or a license to manufacture patented machines, or a copyright. Story on Sales, § 187. An agreement by a shipper to give the master of the vessel an interest in the profits of the shipment, passes no property, either general or special, in the goods. *Fleming v. Bevan*, 2 Penna. St. 408.

CHAPTER V.

OF THE PRICE.

	SEC.		SEC.
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§ 85. It has already been stated that the price must consist of *money*, paid or promised. The payment of the price in sales for cash or on credit will be the subject of future consideration, when the performance of the contract is discussed. We are now concerned solely with the agreement to make a contract of sale.

Where the price has been expressly agreed on, there can arise no question; but the price of goods sold may be determined by other means. If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In *Accebal v. Levy*, (a) the Court of Common Pleas, while deciding this to be the rule of law in cases of *executed* contracts, expressly declined to determine whether it was also applicable to *executory* agreements. But in the subsequent case of *Hoadly v. McLaine*, (b) the same court decided that in an executory contract, where no price had been fixed, the vendor could recover in an action against the buyer, for not accepting the goods, the reasonable value of them; and this is the unquestionable rule of law. (c)¹

(a) 10 Bing. 376.

(b) 10 Bing. 482.

(c) *Valpy v. Gibson*, 4 C. B. 837; 2 Saund. 121e, n. 2, by Williams, Serj., to *Webber v. Tivill*.

1. In *McEwen v. Morey*, 60 Ill. 32, the buyer requested the seller to deliver corn at the warehouse of the buyer and he would make the price satisfactory. "In such case, the law will imply a promise on the part of the defendant to pay the

plaintiff the market value of the corn at the time and place of delivery." In *Fenton v. Braden*, 2 Cranch C. C. 550, goods were ordered and shipped, no price being fixed, but an invoice sent with price. It was held that the purchaser was bound to accept the goods if of such quality as he had ordered, and by acceptance was bound to pay their fair market value, not the invoice price. See *Cunningham v. Ashbrook*, 20 Mo. 553, 559;

§ 86. In *Acebal v. Levy*, the court further declared that where the contract is implied to be at a reasonable price, this means, "Such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the *current price* of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes." 2

What is meant
by a reason-
able price.

*Acebal v.
Levy.*

Dickson v. Jordan, 12 Ired. L. 79, (a doubtful case); *James v. Muir*, 33 Mich. 223, and *Jenkins v. Richardson*, 6 J. J. Marsh. 442. If the parties agree upon a sale, the price to be afterwards fixed between them, and they fail to agree upon a price, there is no sale. *Wittkowsky v. Wasson*, 71 N. C. 451. *Rodman, J.*, said: "There cannot be an executed sale so as to pass the property where the price is to be fixed by agreement afterwards and the parties do not agree. One element of a sale is wanting just as a different element would be if the thing were not ascertained." "If indeed the thing sold has been delivered to the vendee and consumed, so that the parties cannot be put *in statu quo*, the vendee is liable for a reasonable price." A sale, price to be determined by the market rate at a certain time or at a time to be chosen by the vendor, is valid. *Ames v. Quimby*, 96 U. S. 324; *McConnell v. Hughes*, 29 Wis. 537; *Easterlin v. Rylander*, 59 Ga. 292.

2. Reasonable Price—Market Value. —The question of what is a reasonable price is fully discussed in the case of *Kounts v. Kirkpatrick*, 72 Penna. St. 376, 386. *Agnew, J.*, said: "Ordinarily, when an article of sale is in the market and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This

is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market." "The market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption." And after a full statement of authorities, he concludes: "Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated." See *Blydenburgh v. Welsh*, *Baldw.* 331, 340. Judge *Hopkinson* said: "To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property." In *Trout v. Kennedy*, 11 Wright 393, *Strong, J.*, said: "If at any particular time there be no market demand for an article, it is not, of course, on that account of no value." In *James v. Muir*, 33 Mich. 223, 227, *Campbell, J.*, said: "In the present case it is suffi-

§ 87. It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much part of the contract as if fixed by themselves. But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement, and if the persons appointed as valuers fail, or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation. (d) But if the agreement has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in *Clarke v. Westrope*, (e) where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant thereupon consumed the goods, so that a valuation became impossible. ³

Price to be
fixed by
valuers.

cient to say that according to *Acebal v. Levy* there is, at least, no implication of a promise to pay at what may happen to be the market rate, which may not be always, as there held, a reasonable rate." Offers to sell are competent evidence of market value. *Harrison v. Glover*, 72 N. Y. 451.

(d) *Thurnell v. Balbirnie*, 2 C. B. 786; *Cooper v. Shuttleworth*, 25 L. J., Ex. 114; *Vickers v. Vickers*, 4 Eq. 529; *Milnes v. Gary*, 14 Ves. 400; *Wilkes v. Davis*, 3 Mer. 507.

(e) 18 C. B. 765; 25 L. J., C. P. 287.

3. Price to be fixed by Appraisers.—In *Humaston v. Telegraph Co.*, 20 Wall. 20, it appeared that Humaston had transferred to a telegraph company certain patents, the price of which was to be fixed by appraisers. The appraisers were selected and entered upon their duties, but the company withdrew its submission. Thereupon Humaston brought an action for the value, and recovered a verdict. Davis, J., said: "It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if Humaston, in-

stead of the company, had refused to proceed with the arbitration, he could not resort to an action, for the defendant would not have been in default, and therefore not liable to suit. *Del. & H. Canal Co. v. Penna. Coal Co.*, 50 N. Y. 250. But defendant broke the agreement and revoked the submission, and Humaston asks that in consequence of this wrongful action of the defendant, his rights may be determined by the court and jury, instead of by arbitration." "The action can be supported for the value of the property, and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong, and deprive the plaintiff of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators the verdict of the jury can be asked by the plaintiff to determine it." Cites *Benjamin on Sales*, "Conditions," and *Clarke v. Westrope*. See *Norton v. Gale*, 95 Ill. 533; *Newlan v. Dunham*, 60 Ill. 233; *Brown v. Bellowa*, 4 Pick. 178,

§ 88. Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to "arbitration," within the common law procedure act (f) ^{Valuation is not arbitration.} (17 and 18 Vict., c. 125, § 12,) and it was therefore held

189; *Nutting v. Dickinson*, 8 Allen 540; *Hutton v. Moore*, 26 Ark. 382, 394; *De Cew v. Clark*, 19 U. C. C. P. 155. In *Smyth v. Craig*, 3 W. & S. 14, it appeared that three hundred and fifty hogsheads of molasses were sold, marked and set apart for the purchaser, the whole to be taken away by him and gauged, and the price fixed by a third person at the warehouse of the purchaser; payment to be made by surrender of notes of the seller. The seller refused to permit them to be taken away, and the purchaser brought an action of replevin. *Gibson, C. J.*, said: "If I deliver a chattel on terms that the price is to be subsequently fixed by the vendee and myself, I may balk the contract by insisting on more than he will be willing to give for it, and thus regain the possession of my property. But though the price be not settled by the parties, yet if they agree on a method of settling it irrespectively of anything to be done by themselves, it is the same between them when subsequently settled, as if the sum to be given had been an original condition of the bargain; but if the person, to whom the naming of it was referred, die in the meantime, or refuse to act, the contract is at an end." "Nor does the property pass by it in the first instance, for the sale being on a condition precedent does not allow the title to vest before the condition has been performed." "But here the molasses was to be gauged and the price fixed at the purchaser's warehouse; an act that was prevented by the vendor's retention of the property in his actual custody. There is no precedent in the books for such a case, and it is not easy to determine it satisfactorily on principle. The difficulty is to comprehend why such an authority, like a submission

to an arbitrator, or a letter of attorney, may not be revoked before it has been executed. It is settled, however, that a power coupled with an interest in the execution of it is irrevocable, as in *Walsh v. Whitcomb*, 3 Esp. Ca. 565. In *Bromley v. Holland*, 7 Ves. 28, it was said by Lord Eldon that he would not permit a power of attorney given for a valuable consideration to be revoked, and the principle seems applicable to every case where the power is necessary to effectuate a security. Was the power given for that purpose in this instance? It was given to effectuate a sale in discharge of a debt." "Still it may be asked, how is it to go into effect before performance of the act which was a condition precedent to it? *Simply by taking prevention for performance*, as is often done in regard to dependent covenants." And the bargain was carried into effect. In reference to this case, it may be said that perhaps it might properly have been considered as one of those cases where the intent of the parties was to pass the property in the goods, leaving price to be fixed afterwards. See § 311, *infra*. See, also, *Fuller v. Bean*, 34 N. H. 290, 304, where liquor was sold to be valued by one Neal. *Bell, J.*, said "When the parties separated the sale was incomplete. It was at that time contingent whether Neal would make an appraisal, without which there would be no sale. It was an act to be done before the property could pass unless it could be fairly inferred from the evidence relating to the agreement that it was the understanding of the parties that the property should nevertheless, pass at once."

(f) *Collins v. Collins*, 26 Beav. 306; 28 L. J., Ch. 184; *Vickers v. Vickers*, 4 Eq. 529; *Turner v. Goulden*, L. R., 9 C. P. 57.

in *Bos v. Helsham*, (g) that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the 13th section of the act did not apply, so as to authorize the valuer appointed, to act by himself as a sole arbitrator.

It has been held, however, that if the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties. (h) [And in an action against the valuer for negligence the plaintiff is entitled to interrogate him as to the basis of his valuation. (i)]

§ 89. In the civil law it was a settled rule that there could be no sale without a price certain. [“It seems to be of the very essence of a sale,” says Story, J., “that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense.” (k)] “*Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest; sed et certum esse debet*,” was the language of the Institutes. (l) And it was a subject of long contest among the earlier juriconsults whether the necessity for a certain price did not render invalid an agreement that the price should be fixed by a third person; but Justinian put an end to the question by positive legislation: “*Alioquin si inter aliquos ita convenerit, ut quanti Titius rem aestimaverit tanti sit empti, inter veteres satis abundeque hoc dubitabatur sive constat venditio, sive non. Sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio, quanti ille aestimaverit, sub hac conditione stare contractus: ut si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus aestimationem et pretium persolvatur et res tradatur, et venditio ad effectum perducat, emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere.*” (l)

(g) L. R., 2 Ex. 72; 36 L. J., Ex. worth, 25 L. J., Ex. 114.

But see *Re Hopper*, L. R., 2 Q. B. 367; *Re Anglo-Italian Bank*, L. R., 2 Q. B. 452.


(h) *Jenkins v. Beetham*, 15 C. B. 189; 24 L. J., C. P. 94; *Cooper v. Shuttle-*

(i) *Turner v. Goulden*, L. R., 9 C. P. 57, where the distinction is drawn between a valuer and an arbitrator.

(k) *Flagg v. Mann*, 2 Sumner 538.

(l) Lib. 3, tit. 23, § 1

These rules have been adopted in the Code Napoléon :—Art. 1591—
“ *Le prix de la vente doit être déterminé et désigné par les parties.*”
1592—“ *Il peut cependant être laissé à l'arbitrage d'un tiers : si le tiers
ne veut ou ne peut faire l'estimation, il n'y a point de vente.*”



PART II.

SALES UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

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§ 90. The common law which recognized the validity of verbal contracts of sale of chattels, for any amount, and how-
History of the statute. ever proven, was greatly modified by the statute of 29 Chas. II., c. 3. This celebrated enactment, familiarly known as the "Statute of Frauds," is now in force not only in England and most of our colonies, but exists, with some slight variations, in almost every state of the American Union.¹ Its history was but imperfectly known till the year 1823, when Lord Eldon gave to Mr. Swanston, the reporter of his decisions, the MSS. of Lord Nottingham, (a)

1. The seventeenth section of the statute of frauds, which is the one specially affecting sales of chattels, is not in force in Pennsylvania, Illinois, Ohio, Rhode Island, Kansas, Kentucky, Tennessee, Texas, Mississippi, Delaware, North Carolina or Virginia, and is modified in New York, California, Iowa and other states. See Browne on Statute of Frauds. The price at or above which oral contracts are not enforceable varies from \$30 to \$200 in the different states. The conflict of laws arising out of this difference in legislation is discussed in the next note. We

may remark here that a sale made in one state will be controlled by the law of that state, though the goods sold may be in another, and so where a sale was made in New Jersey of goods in Pennsylvania which would have been enforceable if made in the latter state, it was held that no action would lie in New Jersey, because of the New Jersey statute of frauds. *Dacosta v. Davis*, 24 N. J. L. 319. See *Allen v. Schuchardt*, 1 Am. L. Reg. (N. S.) 13.

(a) See note to *Crowley's Case*, 2 Swanst. 83.

among which was his Lordship's report of the case of *Ash v. Abdy*, (b) in which he said, on the 13th of June, 1678, less than two years after the passage of the law, that he overruled a demurrer to a bill which "was to execute a parol agreement, before the late act, for prevention of frauds and perjuries, but the bill itself was exhibited since the act." The ground of the decision was, that the statute was intended to be prospective solely, and not retrospective, "and I said, that I had some reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and the civilians." (c)

§ 91. The section of the statute which is specially applicable to the subject of this treatise is the seventeenth. In the examination of its provisions, and of the rules for its construction and application, the arrangement of Lord Blackburn will be followed, as not susceptible of improvement. The language of the seventeenth section is as follows:

"And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandises, for the *price* (d) of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." 2

(b) 3 Swanst. 664, Appendix. In North's "Life of Lord Keeper Guildford," vol. I., p. 108, he states of his Lordship: "He had a great hand in the statute of frauds and perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Justice Hale had the pre-eminence, and was chief in the fixing of that law, although the urging part lay upon him, and I have reason to think it had the first spring from his Lordship's notice." Lord Mansfield doubted the statement as to Sir Matthew Hale, who died before the bill was introduced. 1 Burr. 418.

(c) As to the traditions of the aid and co-operation of Lord Hale and Sir Leoline Jenkins, see *Wain v. Warlters*, 5 East 10; *Windham v. Chetwynd*, 1 Burr. 419; *Wynn's Life of Sir Leoline Jenkins*, vol. I., p. 8.

(d) This word changed to "value," *post* § 98.

2. Whether the seventeenth section renders void a contract within its terms, or merely prevents an action upon it, leaving it in force for all other purposes, is an important question which has given rise to different opinions. The fourth section (§ 112, *infra*,) provides that "no action shall be brought upon any contract or

§ 92. The first question that obviously presents itself under this enactment is, what contracts are embraced under the words "contracts for the sale of any goods, &c." A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general estate

What contracts embraced in it.

sale of lands," &c., unless in writing, and does not declare the contract void, and this has been held to affect the remedy and not to annul the contract. *Leroux v. Brown*, 12 C. B. 801; *Haynes v. Nice*, 100 Mass. 329. But the seventeenth section provides that no sale for £10 or upwards "*shall be allowed to be good, except,*" &c. Does this mean that such sale shall not be allowed to be good for any purpose? If so, it is void. Or does it mean only that no such sale shall be allowed to be good for the purpose of a recovery under it? If so, then it will be good for all other purposes, and the statute is a rule of evidence affecting the remedy only. The latter conclusion is supported by a consideration of the purpose of the act, to prevent perjury, and by the analogy of the fourth section. The importance of this question will be readily seen. Suppose suit is brought in Illinois upon a contract made in Massachusetts, within the seventeenth section, which is not law in Illinois, will the Illinois court enforce it? If it is void in Massachusetts, they will not, but if it is valid, the Illinois court being under no disabling rule of evidence, can enforce it, though not enforceable in Massachusetts, because not provable there. On the other hand, suppose an oral contract of sale made in Illinois and sued on in Massachusetts, can the Massachusetts court sustain the action? On the principle that a contract good where made is good everywhere, the suit would seem maintainable, but if the seventeenth section is a rule of evidence affecting the remedy, such suit cannot be maintained, for the court cannot change its rules of evidence, because the cause of action

arose in another state, as perjury is no less to be feared in suits on foreign than in suits on domestic sales. Thus, under the fourth section, it has been held that a contract valid in France could not be sued on in England, because within that section. See *Leroux v. Brown* and *Haynes v. Nice*, *supra*. Another important result of the determination of this question is to settle the validity of contracts within the seventeenth section when called in question by strangers. If the section relates only to the remedy, and does not make such contracts void, then they must be considered valid when they come collaterally in question; that is, when no remedy is sought upon them.

Decisions that the Seventeenth Section makes void the Contract.—An early decision is found in *Low v. Andrews*, 1 Story 38, where Judge Story charged a jury that a contract made in France was not within the statute of frauds of Massachusetts where the suit was brought. The same statement of the law was made in *Allen v. Schuchardt*, 1 Am. L. Reg. (N. S.) 13, in United States Circuit for New York, by Judge Nelson, who said: "The contract of sale in this case was made in Rhode Island, and though verbal is there valid, as no sale note is required as in our statute of frauds." But it must be observed that the New York act declares contracts within its terms void. In these two cases the question was not discussed, but it is in *Houghtaling v. Ball*, 20 Mo. 563, under a statute similar to that of England, and the same result is there reached. The question is intelligently discussed in *Green v. Lewis*, 26 U. C. Q. B. 618. Goods were sold in Illinois, and suit for

of the other in case of default, but having no effect to transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities of an owner; and this is an "executory agreement."

the price was brought in Upper Canada, where such a sale would be within the seventeenth section. The court sustained the sale because valid in Illinois, and distinguished *Leroux v. Brown*, 12 C. B. 801, as applicable only to the fourth section. See, also, *Pollock's Principles of Contracts*, 575, note (b), to the effect that sales within the seventeenth section are void, not only as between the parties, but for all purposes.

Decisions that the Seventeenth Section makes void the Remedy only.—In *Bailey v. Sweeting*, 9 C. B. 843, 859, *Williams, J.*, said: "The effect of that enactment" (the seventeenth section) "is, that although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, *e. g.*, unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract." Upon the strength of this opinion a carefully prepared argument was written and published in the *American Law Review*, vol. IX., p. 434, in support of the proposition that the seventeenth section of the English statute, like the fourth, does not validate contracts within its terms, but is a rule of procedure applicable only to suits upon such contracts. The question being fairly raised came up before the Supreme Court of Massachusetts, where it received thorough consideration in the case of *Townsend v. Hargreaves*, 118 Mass. 325, 334. *Cutl, J.*, said: "Allowed to be good, means good for the purpose of a recovery under it." "In carrying out its

purpose the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished, if acceptance and actual receipt of part be shown, then the oral contract as proved by other evidence is established with all the consequences which the common law attaches to it." In *Norton v. Simonds*, 124 Mass. 19, 21, *Endicott, J.*, quoted and applied the following language in *Townsend v. Hargreaves*: "The contract is treated as a subsisting valid contract, when it comes in question between other parties for purposes other than a recovery upon it." *Amsnick v. Am. Ins. Co.*, 129 Mass. 185, was a suit for insurance of a vessel. The defence was that at the time of the insurance plaintiff had no title, having simply made an oral agreement to buy within the statute of frauds, which was not carried out until afterwards. *Endicott, J.*, said: "But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed even as between the parties themselves it stands unaffected by the statute." These Massachusetts cases accord with *Browne on Statute of Frauds*, § 115, and may probably be accepted as correctly expressing the law in those states where the statute conforms in substance to the seventeenth section of the English act. *Rickard v. Cunningham*, 10 Neb. 417; *Smith v. Smith*, 14 Vt. 440; *Davis v. Inscoe*, 84 N. C. 396; *Green v. N. C. R. R. Co.*, 77

Or it may be a perfect sale, as already defined, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves, independently of any personal remedy against the vendor for breach of contract, and rendering him liable to the risk of loss in case of their destruction; and this is a "bargain and sale of goods."

§ 93. The distinction between these two agreements will be more fully considered hereafter; but for the present it suffices to remark, that until the year 1828, the decisions were somewhat contradictory, and perhaps irreconcilable, on the question whether the words "contracts for the sale of any goods, &c.," in this section, were applicable to agreements for future delivery, that is to say, to executory agreements, or only to such as were equivalent to the common law contract, known as a bargain and sale.³ The decisions excluding such contracts from the operation of the statute were principally *Towers v. Osborne*, (e) in 1724, *Clayton v. Andrews*, (f) in 1767, and *Groves v. Buck*, (g) in 1814. Those which upheld the contrary rule, were *Rondeau v. Wyatt*, (h) in 1792, *Cooper v. Elston*, (i) in 1796, and *Garbutt v. Watson*, (k) in 1822. The question is no longer open, for the legislature intervened, and in 9 Geo. IV., c. 14, § 7, known as "Lord Tenterden's act," recited, that "it has been held that the said recited enactments" (i. e., the seventeenth section of the statute of frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeded to enact that the pro-

N. C. 95; *Chicago Dock Co. v. Kensie*, 49 Ill. 289.

3. The Statute Applies to Executory Contracts.—In *Carman v. Smick*, 15 N. J. L. 252, *Hornblower, C. J.*, said: "The distinction between executory and executed contracts as respects this subject was overruled in *Rondeau v. Wyatt* and in *Cooper v. Elston*, which cases have been considered as settling the rule in the English courts, and in the language of the Supreme Court of New York, in *Bennett v. Hull*, 10 Johns. 364, contain the sound and just construction of the statute." See, also, *Finney v. Apgar*, 31 N. J. L. 270; *Jackson v. Covert*, 5 Wend. 139; *Cason v. Cheely*, 6 Ga. 554; *Edwards v. Grand*

Trunk R. R., 48 Me. 379; *Pitkin v. Noyes*, 48 N. H. 297; *Mixer v. Howarth*, 21 Pick. 207. In *Hardell v. McClure*, 1 Chand. 279, *Hubbell, J.*, laying down the rule for "this young state, where the case is presented somewhat as a case of first impressions," said: "We regard the act of 9 Geo. IV. as laying down no new principle, but as containing in clear, explicit language the true construction of the original act."

(e) 1 Strange 506.

(f) 4 Burr. 2101.

(g) 3 M. & S. 178.

(h) 2 H. Bl. 63.

(i) 7 T. R. 14.

(k) 5 B. & Ald. 613.

visions of the seventeenth section "shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

It is settled in *Scott v. Eastern Counties Railway Company*, (l) and in *Harman v. Reeves*, (m) that this enactment must be "value" and construed as incorporated with the statute of frauds, and "price." and that its effect is to substitute the word "value" for "price" in the seventeenth section.

§ 94. There have been numerous decisions, and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale," &c., under the seventeenth section, or contracts for work and labor done and materials furnished. A review of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent judges.

Distinction between "sales" and "work and labor done, and materials furnished."

Towers v. Osborne (n) was on an agreement to make and furnish a chariot. Held, not within the statute. But the ground of decision in this case was, that the seventeenth section did not apply to executory agreements, and on this point the case is met by Lord Tenterden's act.

Towers v. Osborne.

In *Clayton v. Andrews*, (o) a contract for the future delivery of wheat not yet threshed was held not within the statute, under the authority of the preceding case.

Clayton v. Andrews.

§ 95. In *Groves v. Buck*, (p) the agreement was for the purchase by defendant of a quantity of oak pins, *not then in existence*, but that were to be cut by plaintiff out of slabs owned by him, and to be delivered at a future time. This agreement was held not to be embraced in the seventeenth section of the statute of frauds. Lord Ellenborough put his opinion on the ground that "*the subject matter of this contract did not exist in rerum natura* ; it was incapable of delivery and of part acceptance, and where that is

Groves v. Buck.

(l) 12 M. & W. 33.

(n) 1 Strange 506.

(m) 18 C. B. 587, and 25 L. J., C. P.

(o) 4 Burr. 2101.

57.

(p) 8 M. & S. 178.

the case, the contract has been considered not within the statute."⁴ This ground is again met by the 9 Geo. IV., c. 14, § 7, but Dampier, J., in declining to apply the case of *Rondeau v. Wyatt* (presently noticed,) said that this last-mentioned case was distinguishable, because in the other cases cited "some work was to be performed."

§ 96. In *Rondeau v. Wyatt*, (q) where an executory contract was held to be within the statute, Lord Loughborough said, that "the case of *Towers v. Sir John Osborne* was plainly out of the statute, not because it was an executory contract, as has been said, but because it was *for work and labor to be done and materials and other necessary things to be found*, which is different from a mere contract of sale, to which alone the statute is applicable." His Lordship also disposed of the case of *Clayton v. Andrews* (r) subsequently overruled in *Garbutt v. Watson*, (s) by saying that in that case also "there was some work to be performed, for it was necessary that the corn should be threshed before the delivery."

§ 97. In *Garbutt v. Watson*, (s) where a sale of flour, to be manufactured out of wheat yet unground, was held to be within the statute, Abbott, C. J., said, that in *Towers v. Osborne*, "the chariot which was ordered to be made, *would never, but for that order, have had any existence.*"⁵ This expression, as well as the similar one by Lord Ellenborough in *Groves v. Buck* (ante p. 90,) would imply that the distinction between a "contract for sale" and one for "work, labor, and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. Bayley, J., however, put his opinion on the ground, that "this was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labor and ma-

4. This case was followed in *Gadsden v. Lance*, 1 McMull. Eq. 91, but that case is no longer law in South Carolina. See *Bird v. Muhlenbrink*, 1 Rich. 199.

(q) 2 H. Bl. 63.

(r) 4 Burr. 2101.

(s) 5 B. & Ald. 613.

5. In *Hardell v. McClure*, 1 Chand.

277, *Garbutt v. Watson* is stated as asserting "the doctrine that all contracts were within the scope and intent of the statute, when the result of the bargain was a sale and transfer of chattels," and this principle is adopted for Wisconsin, being that afterwards ratified in *Lee v. Griffin*.

terials found. I think it was the former, and if so, it falls within the statute of frauds."

Holroyd, J., concurred "that this was a contract for the sale of goods," but neither of the judges gave a reason for this opinion (undoubtedly correct), and thus no aid is afforded by their language in furnishing a test for distinguishing the two contracts from each other.

§ 98. In *Smith v. Surman* (t) an action was brought to recover the value of certain timber, under a verbal contract, by which plaintiff agreed to sell to defendant at so much per foot ^{*Smith v. Surman.*} the timber contained in certain trees then growing on plaintiff's land. Bayley, J., was of opinion, that "this was a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, *was doing work for himself, and not for the defendant.*"

§ 99. In *Atkinson v. Bell* (u) the whole subject was much discussed. The action was in *assumpsit* for goods sold and delivered, ^{*Atkinson v. Bell.*} goods bargained and sold, work and labor done, and materials found and provided. The facts were, that one Kay had patented a certain machine, and the defendants, thread manufacturers, desiring to try it, wrote him *an order to procure to be made for them as soon as possible* some spinning-frames in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames, and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Sleddon's premises. On the 23d of June, Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th of August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action was brought. The judges were all of opinion that the property in the goods had not vested in the defendants, (x) and that a count for goods bargained and sold could not be maintained; but Bayley and Holroyd, JJ., expressed the opinion that a count for not accepting would have supported the

(t) 9 B. & C. 568.

(u) 10 B. & C. 277.

(x) On this subject see *post*, Book II.

verdict in the plaintiff's favor. On the count for work and labor and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendant's, that is to say, that the contract was an executory agreement for sale, and not one for work, &c. Bayley, J., said, "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor done. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work, but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labor, *because his labor was bestowed on his own materials*, and for himself, and not for the person who employed him."

The concluding passage of this opinion is no doubt too broadly expressed, for although true generally, it is not universally the case that an action for work and labor will not lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of *Atkinson v. Bell*, (y) subjecting it to the criticisms of Maule and Erle, JJ., in *Grafton v. Armitage*, (z) and of Pollock, C. B., in *Clay v. Yates*, (a) but it was fully recognized in the subsequent case of *Lee v. Griffin*. (b)

§ 100. *Grafton v. Armitage* (c) was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for

(y) See remarks on another point decided in *Atkinson v. Bell*, *post*, Book II., ch. V.

(a) 2 C. B. 336; 15 L. J., C. P. 20.

(z) 25 L. J., Ex. 237; 1 H. & N. 73.

(b) 30 L. J., Q. B. 252; 1 B. & S. 272.

(c) 2 C. B. 336; 15 L. J., C. P. 20.

work, labor and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan-drawing of, a machine, &c., engaged three days, at one guinea per. day, £3 3s.; for workman's time in making, &c., and experimenting therewith, £1 5s.; for use of lathe for one week, 12s.; for wood and iron to make the drum, and for brass tubing for the experiments, 5s." Defendant insisted, on the authority of *Atkinson v. Bell*, that the action should have been case for not accepting the goods, not debt for work and labor, &c., citing the *dictum* at the close of Bayley, J.'s, opinion. But Maule, J., said: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the *plaintiff* (*sic*, plainly meaning *defendant*,) or that are to be handed over to him." Erle, J., said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink; might he not maintain an action for work and labor in preparing it?" In delivering the decision, Tindall, C. J., pointed out as the distinction, that in *Atkinson v. Bell*, the substance of the contract was that the machines to be manufactured were to be sold to the defendant, but that in the case before the court the substance of the contract was not that the plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labor and materials in devising for the use of defendant a mode of attaining a given object. Coltman, J., concurred, and said that the opinion of Bayley, J., was on "precisely the same ground as the Lord Chief Justice puts this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labor bestowed by him in the fabrication of them."

§ 101. In *Clay v. Yates*, (d) the subject was treated by Pollock, C. B., in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the de- *Clay v. Yates.*
fendant a second edition of a work previously published by the defendant, the plaintiff to find the materials, including the paper. Held, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor, furnishing the materials; and that the case was not governed by Lord Tenterden's act. Pollock, C. B., said: "As to the first point, whether this is an action for goods

(d) 25 L. J., Ex. 237; 1 H. & N. 73.

sold and delivered, and requiring a memorandum in writing, within the seventeenth section of the statute of frauds, I am of opinion that this is properly an action for work and labor, and materials found. I believe it is laid down in the commencement of Chitty on Pleading, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing. The point made in the case cited, in which Bayley, J., gave an opinion, (*Atkinson v. Bell*), I think may be answered by the opinion of Maule, J., in the Court of Common Pleas, (*Grafton v. Armitage*); and then we have to decide the matter as if it were now without any authority at all. It may be that in all these cases, part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me *the true rule is this, whether the work and labor is of the essence of the contract, or whether it is the materials that are found.* My impression is, that in a case of work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labor of the highest description, and the material is of no sort of importance as compared with the labor, and therefore that all this would be recoverable as work and labor, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered; but still it would not prevent the price being recovered as work and labor, and materials found. It appears to me, therefore, that this was properly sued for as work and labor, and materials found, and that the statute of frauds does not apply; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the act of Lord Tenterden applies;* and one of the reasons why you find no cases on this subject in the books is, that before Lord Tenterden's act passed, the statute of frauds did not apply to the case of a thing begun, whatever it might be."

Alderson, B., concurred, and Martin, B., said: "There are three matters of charge well known in the law—for labor simply, for work

and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that he shall print the work on paper, and that the paper shall be submitted to the author; that the author shall correct it and send it back to the printer, and then the latter shall exercise labor again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labor, and supply materials for it, and he is to be paid for it; and it really seems to me *that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered*, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to be paid for his work and labor, and for the materials he had used upon the work; and, therefore, this is a case of work, labor and materials done and provided by the printer for the defendant." The learned baron also put this case: "Suppose an artist paints a portrait for three hundred guineas, and supplies the canvas for it worth 10s., surely he might recover on a count for work and labor."

§ 102. In *Lee v. Griffin*, (d) ⁶ the last reported case, the foregoing *opinions* of the Chief Baron and Baron Martin were questioned, and not followed, though the *decision* was ^{*Lee v. Griffin.*} approved. This action was brought by a dentist, to recover £21 for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. When *Clay v. Yates* was quoted by the plaintiff in support of the position that the skill of the dentist was the thing really contracted for, that the materials were only auxiliary, and that the count for work and labor was therefore maintainable, Hill, J., said: "*Clay v. Yates* is a case *sui generis*. The printer, the plain-

(d) 80 L. J., Q. B. 252; 1 B. & S. 272.

6. This case, which is said to have settled the law in England, has been followed in Ontario province, (*Wolfenden v. Wilson*, 33 U. C. Q. B. 442.) in Minnesota, (*Burt v. Bailey*, 21 Minn. 402,) and is received with favor in New Hamp-

shire, (*Prescott v. Locke*, 51 N. H. 94,) and Connecticut, (*Atwater v. Hough*, 29 Conn. 508.) But in New Jersey Chief Justice Beasley declared *Lee v. Griffin* "a wide divergence," and refused to follow it. *Finney v. Appgar*, 31 N. J. L. 286. See §§ 109, 110, *infra*.

tiff there, in effect does work chiefly on the materials which the defendant supplied; although, to a certain extent, the plaintiff may be said to supply materials; moreover, *the printer could not sell the book to any one else.*"

Crompton, J., said: "*When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.* The case of *Clay v. Yates* turned, as my brother Hill pointed out, upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision, but we should be bound by it in a case precisely similar in its circumstances, which the present is not. *I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labor, and not for the sale of a chattel.* It may be, the cause of action is for work and labor when the materials supplied are merely auxiliary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, viz., *the teeth, are the principal subject matter*; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

Hill, J., said: "I think the decision in *Clay v. Yates* perfectly correct, according to the particular subject matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one and afterwards to be delivered to the other; but *when the subject matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor.* In my opinion, *Atkinson v. Bell* is good law, subject only to the objection to the dictum of Bayley, J., which has been repudiated by Maule, J., and Erle, J., in *Grafton v. Armitage.*"

Blackburn, J., said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if *the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy.* In *Clay v. Yates*, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel. * * * I do not think that the relative value of the labor and of the materials on which it is bestowed can

in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel."

§ 103. In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in *Lee v. Griffin*, in 1861, should not have been Remarks on the cases. earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough, in 1814, and closing with Pollock, C. B., in 1856. From the very definition of a sale, the rule would seem to be at once deducible, *that if the contract is intended to result in transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel*, and unless that be the case, there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley, J., in *Atkinson v. Bell*, and Tindal, C. J., in *Grafton v. Armitage*; but it was not clearly and distinctly brought into view before the decision in *Lee v. Griffin*. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result, as will subsequently appear.

§ 104. The principles suggested as affording a test on this subject prior to the case of *Lee v. Griffin* were the following:—

1st.—That if the subject matter of the contract was not in existence, not *in rerum natura*, as Lord Ellenborough expressed it, the contract was not "for the sale of goods." This was the opinion of Lord Ellenborough in *Groves v. Buck*; (e) of Abbott, C. J., as shown by his comment on *Towers v. Osborne*, in the opinion delivered in *Garbutt v. Watson*; (f) and may be inferred from *Rondeau v. Wyatt* (g) to have been the opinion of Lord Loughborough.⁷

That the decision in *Towers v. Osborne* was wrong, if it went upon the ground that Lord Loughborough states, viz., that the order for the chariot was not a contract or agreement for the sale of a chattel, is no longer questionable. The familiar example put by the judges in several of the cases, of an order to a tailor or shoemaker for a gar-

(e) 3 M. & S. 178.

(f) 5 B. & A. 613.

(g) 2 H. Bl. 63.

7. This is substantially the rule in New York. See note to § 109, *infra*.

ment or pair of shoes, both of which are treated as undoubted cases of contracts for the sale of chattels, is exactly the same as the order in *Towers v. Osborne*. The intention of the parties was that the result should be a transfer for a price, by Towers to Sir John Osborne, of a chattel in which Sir John had no previous property, and this was clearly a contract for a sale.

§ 105. 2d.—The second principle suggested as the true test was by Bayley, J., first in *Smith v. Surman*,^(h) afterwards more fully developed in *Atkinson v. Bell*,⁽ⁱ⁾ viz., that if the materials be furnished by the employer, the contract is for work and labor, not for a sale; but if the material be furnished by the workman who makes up a chattel, he cannot maintain “work and labor,” because his labor was bestowed on his own materials and for himself, and not for the person who employed him. The first branch of this rule is undoubtedly correct, as shown by the principles settled in *Lee v. Griffin*, because where the materials are furnished by the employer, there can be no transfer to him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing can be due from him save compensation for labor; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labor done, and materials furnished. But the second part of the rule is inaccurate, as pointed out in *Grafton v. Armitage* and *Lee v. Griffin*. A man may be responsible for damage done to another’s chattel, as, for example, to a coachmaker’s vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labor done, and materials furnished by the coachbuilder, although bestowed on a thing which is his, and is to remain his after being repaired at another’s expense.

§ 106. 3d.—The third attempt to supply the true test on this matter previously to its satisfactory settlement in *Lee v. Griffin*, was made by Pollock, C. B., in *Clay v. Yates*.^(k) The proper rule, in his opinion, is this, “Whether the work and labor is of the essence of the contract, or whether it is the materials that are found. This test was decisively rejected by Crompton and Blackburn, JJ., in *Lee v. Griffin*. It cannot be supported, even in the extreme case put by

(h) 9 B. & C. 568.

(k) 25 L. J., Ex. 237; 1 H. & N. 73.

(i) 10 B. & C. 277.

Martin, B., of a portrait worth three hundred guineas on a canvas worth 10s. If the employer owned nothing whatever that went into the composition of the picture—if neither materials, nor skill, nor labor were supplied by him, it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided; it is not the less true, that none of these elements were owned by the employer before the contract, and that the chattel composed of them is by the terms of the contract to be transferred for a price by the former owner to the employer. The test suggested by Martin, B., in his opinion as found in the Law Journal Report, is accurate as far as it goes, but it does not cover more than the point in the case before the court. The learned baron said: "Suppose the plaintiff had brought an action to recover the value of that which he had delivered, would that be the value of the book? I apprehend not, for the book might not be worth half the value of the paper it was written on." This is true, and why? Because a part of the materials of the book—its chief materials, indeed—to wit, the composition, had been furnished by the employer, belonged to him already, and therefore *could* not be sold to him by the printer. The only remedy then remaining was an action for work and labor and materials.

§ 107. Cases are sometimes put, as a test of principles, that are so extreme as to be best disposed of by the application of the familiar rule, "*de minimis non curat lex*." Thus the example of an attorney employed to draw a deed, is dismissed by Blackburn, J., in *Lee v. Griffin*, with the simple remark that it is an abuse of language to say that the paper or parchment are goods sold and delivered. So, if a man send a button or a skein of silk to be used in making a coat, it would be mere trifling to say that he was part owner of the materials, and that an action for goods sold would not therefore lie in favor of the tailor who furnished the garment. Such matters cannot be considered as having entered into the contemplation of parties when contracting, nor as forming any real part of the consideration for the mutual stipulations.

§ 108. Where a contract is made for furnishing a machine or a

A chattel intended for a fixture to a freehold.

movable thing of any kind and *fixing it to the freehold*, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land. (l)

[And the same rule applies when the substance of the contract is to make improvements to a chattel already in existence, *e. g.*, to make and fix boilers to a ship. (m)]

§ 109. In America, as before observed, the same perplexity has been exhibited as marks the history of the subject in our own law, and in *Lamb v. Crafts*, (n) Chief Justice Shaw said: "The distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement." This opinion seems to have been deduced from some observations of Abbott, C. J., in *Garbutt v. Watson*, and rests on no satisfactory principle. Mr. Story, whose treatise in the edition of 1862 contains no reference to the then recent case of *Lee v. Griffin*, avows his difficulty, and suggests that it would probably be held "that where the labor and service were the essential considerations, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute; where the labor and service were only incidental to a subject matter *in esse*, the statute would apply." (o) Thus is the rule suggested by Pollock, C. B., in *Clay v. Yates*, and rejected in *Lee v. Griffin*.

In Mr. Hilliard's treatise on Sale, the contradictory decisions are given without any attempt on the part of the learned author to reconcile them or deduce any general principles applicable to the controverted question. (p) ⁸

(l) *Cotterell v. Apaley*, 6 Taunt. 322; *Tripp v. Armitage*, 4 M. & W. 687; *Clark v. Bulmer*, 11 M. & W. 243.

(m) *Anglo-Egyptian Navigation Company v. Rennie*, L. R., 10 C. P. 271.

(n) 12 Metc. 356. See, also, the case of *Smith v. The N. Y. Central Railroad*

Company, 4 Keyes 180, in which all the authorities are reviewed.

(o) Story on Sales, § 260 c. See, however, note to 4th edition (1871.)

(p) Hilliard on Sales, 464, 467.

8. This subject was thoroughly canvassed by Commissioner Dwight in *Cooke*

§ 110. [The rules adopted by the courts of the different states for determining whether a contract is one of sale or for work and labor directly conflict with one another; and it will suffice to mention that in Massachusetts the established

Rule in *Lee v. Griffin* not generally approved.

v. Millard, 65 N. Y. 352. He cites *Lee v. Griffin* and Benjamin on Sales as showing the English rule.

Massachusetts Rule.—Commissioner Dwight says: "The Massachusetts rule as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can at the time stipulated for delivery be regarded as '*goods, wares and merchandise*,' in the sense of being generally marketable commodities, made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is rather whether the manufacturer produces the article in the general course of his business or as the result of a special order. *Goddard v. Binney*, 115 Mass. 450. In this very recent case the result of their decisions is stated in these terms: 'A contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute.' Under this rule it was held in *Gardner v. Joy*, 9 Metc. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was a contract of sale. On the other hand, in *Goddard v. Binney*, *supra*, the contract with a carriage manufacturer was, that he should make a buggy for the person ordering it, that the

color of the lining should be drab and the outside seat of cane, and have on it the monogram of the party for whom it was made. This was held not to be a contract of sale within the statute. See, also, *Mixer v. Howarth*, 21 Pick. 205; *Lamb v. Crafts*, 12 Metc. 353; *Spencer v. Cove*, 1 Metc. 283." This is probably the rule in New Jersey. *Finney v. Apgar*, 31 N. J. L. 266. In that case C. J. Beasley reviews the English authorities, pronounces *Lee v. Griffin* "a wide divergence from the grounds upon which rest the original decisions," and lays down the rule: "That when a contract is made for an article not existing at the time *in solido*, to use the expression of the old cases, and when such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is, in substance and effect, not for a sale, but for work and materials." The case before the court was a contract to finish and deliver "small pieces of wood in the rough, which could be conveniently turned into wagon spokes," and it was held to be a sale. "In principle the case seems to fall within the boundaries of that class of cases which exemplify the distinction between a mere preparation or slight alteration of the form of a thing which in substance exists at the time the contract is made, and the conversion of the raw material into the perfected form of the manufactured article." In Maine the law accords in substance with that of Massachusetts. *Abbott v. Gilchrist*, 38 Me. 260; *Crockett v. Scribner*, 64 Me. 447. See, also, *Barbour v. Disher*, 11 Rich. 347; *Phipps v. McFarlane*, 3 Minn. 109; *O'Neil v. N. Y. and Silver Peak Mining Co.*, 3 Nev. 141. In Iowa the Mas-

rule is based upon the distinction referred to by Shaw, C. J., in *Lamb v. Crafts*, *supra*, and in the most recent case on the subject in that

sachusetts rule is established by statute, providing that executory contracts for sale shall not be within the statute "when the article sold is not ready for delivery, but labor, skill or money are to be expended in procuring or producing the same." *Bennett v. Nye*, 4 Greene 410; *Partridge v. Wilsey*, 8 Iowa 459; *Brown v. Allen*, 35 Id. 306.

The New York Rule.—Commissioner Dwight having set forth the Massachusetts rule, as above quoted in *Cooke v. Millard*, continues: "The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word *sale*. The latest and most authoritative expression of the rule is found in a recent case in this court. *Parsons v. Loucks*, 48 N. Y. 17, 19. The contrast between *Parsons v. Loucks*, in this state, on the one hand, and *Lee v. Griffin*, in England, on the other, is that in the former case the word *sale* refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery as contemplated by the parties. If at that time it is a chattel, it is enough according to the British rule." "The case at bar does not fall within the rule in *Parsons v. Loucks*. The facts in that case were that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and, so far as appears, not even the rags. So in *Sewall v. Fritch*, 8 Cow. 215, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber was all in existence when the contract was made. It only needed to be prepared for the purchaser, dressed and put in condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed by principle. Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enumerated in *Lee v. Griffin*. It is too late to adopt it in full in this state. The court, however, in view of the present state of the law should plant itself, so far as it is not precluded from so doing by authority upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state is, that when the chattel is in existence so as not to be governed by *Parsons v. Loucks*, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will, however, be readily classified." The following cases support this rule. *Downs v. Roes*, 23 Wend. 270; *Smith v. Cent. R. R.*, 4 Keyes 180; *Bates v. Coester*, 3 N. Y. Sup. Ct. (T. & C.) 580; *Wright v. O'Brien*, 5 Daly 54; *Flint v. Corbitt*, 6 Daly 429; *Deal v. Maxwell*, 51 N. Y. 652; *Higgins v. Murray*, 78 N. Y. 252; *Cason v. Cheeley*, 6 Ga. 554; *Eichelberger v. McCauley*, 5 Harr. & J. 213; *Rentch v. Long*, 27 Md. 188. In *Downs v. Roes*, *supra*, *Bronson, J.*, said: "If the thing sold exist at the time in *solido*, the

state the rule was defended on the ground of its justice and convenience, while the rule laid down in *Lee v. Griffin* was referred to but not followed. (q) On the other hand, in New York and some of the other states of the Union, the distinction is taken between an agree-

mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute," and this expression has been often quoted.

The English Rule.—In Connecticut the case of *Atwater v. Hough*, 29 Conn. 508, seems to incline towards the English rule. In Minnesota the case of *Phipps v. McFarlane*, 3 Minn. 109, followed the Massachusetts rule, but in the latest decision on the subject, (*Brown v. Sanborn*, 21 Minn. 402,) the English rule is followed. In that case defendant agreed to purchase the flax straw to be raised from forty-five bushels of flax seed. *Berry, J.*, cited *Benjamin on Sales*, and said: "It was essentially a contract for the straw, and not, as contended by plaintiff, for labor or skill in producing the straw." In New Hampshire the English rule seems to be established by the case of *Prescott v. Locke*, 51 N. H. 94, which cites and follows *Lee v. Griffin*, though the previous case of *Pitkin v. Noyes*, 48 N. H. 294, accords with the law of Massachusetts, and is not expressly overruled. In *Prescott v. Locke* the oral contract was for the sale of walnut spokes, to be sawn and delivered, not exceeding one hundred thousand, in lots of ten thousand each. *Foster, J.*, said: "Where the contract is for a chattel to be made and delivered, it is clearly a contract for the sale of goods. In such case the party supplying the chattel cannot recover for his labor in making it. *If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for labor*, but if the result of the contract is that the party has done work and labor which end in nothing that can become the subject of a sale, the party can-

not sue for goods sold and delivered. Illustrations of the former proposition are: where a carriage was ordered to be made, which would never, but for the order, have had an existence, but, when made, becomes the subject of sale. This principle has been applied even to the making of a coat, a statue, a set of artificial teeth from materials provided by the maker, even where the peculiar skill of the maker is considered to be an important element in the consideration of the contract; for the value of the skill and labor as compared with that of the material supplied, is not a criterion to determine what the contract is. The true construction in this case is that the contract was for the future sale of the spokes, when they should be in a state fit for delivery. The vendor, so long as he was sawing the timber, and doing any other work preparing it for delivery in the form of spokes, was doing work for himself upon his own materials, and not for the defendants. The plaintiff was to convert the timber into spokes, and, when so converted, the delivery and acceptance were to occur. Until that time the contract would remain executory, and the title to the property would continue to be in the plaintiff." In the province of Ontario the case of *Lee v. Griffin*, is approved and followed. *Wolfenden v. Wilson*, 33 U. C. Q. B. 442. This was a case where a tombstone was ordered, and was prepared and lettered. It was held a contract for sale, not for labor, and therefore not actionable, because oral. If the rules laid down in the case of *Hardell v. McClure*, 1 Chand. 277, are followed in Wisconsin, that state may be classed as supporting the rule in *Lee v. Griffin*.

(q) *Goddard v. Binney*, 115 Mass. 450.

ment for the sale and delivery at a future day of articles then existing, and an agreement to sell and deliver articles not then manufactured, but to be made afterwards; the courts holding that the latter are contracts for work and labor and materials found, and not within the statute. (r) This is the principle which was adopted by some of the English judges in cases prior to *Lee v. Griffin*, among others by Abbott, C. J., in *Garbutt v. Watson*. In a recent case in the State of New Hampshire, (s) the rule of distinction as laid down by Blackburn, J., in *Lee v. Griffin* was cited with approval, and apparently followed.]

It was at one time questioned whether sales of goods by public auction were embraced within the statute. Lord Ellenborough's strong *dicta* in *Hinde v. Whitehouse*, (t) in 1806, seem to have put an end to the doubt, and the authority of that case was recognized in *Kenworthy v. Schofield*; (u) so that the question suggested on this point by Lord Mansfield, in *Simon v. Motivos*, (x) has long been at rest. ⁹

(r) *Crookshank v. Burrell*, 18 Johns. 58; *Pitkin v. Noyes*, 48 New Hampshire 294, where it is said that the above is the settled rule in the State of New York.

(s) *Prescott v. Locke*, 51 New Hampshire 84.

(t) 7 East 558.

(u) 2 B. & C. 945.

(x) 3 Burr. 1921, and 1 W. Bl. 599.

9. *Jenness v. Wendell*, 51 N. H. 63;

Pike v. Balch, 38 Me. 302; *Johnson v.*

Buck, 35 N. J. L. 338; *Tallman v.*

Franklin, 14 N. Y. 584; *Balitsen v.*

Nicolay, 53 Id. 467; *Davis v. Rowell*, 2

Pick. 63.

CHAPTER II.

WHAT ARE GOODS, WARES AND MERCHANDISE.

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§ 111. The seventeenth section of the statute applies to contracts for the sale of "goods, wares, and merchandise," words which comprehend all corporeal movable property.

The statute, therefore, does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights and property.¹ The following cases have been decided on this point:

Choses in action not within the statute.

1. In the United States, statutes, as well as decisions, differ with reference to the personal property included in the terms of the statute of frauds. Choses in action are expressly included in the statutes of New York, California, Minnesota and some other states. The following decisions illustrate the New York act: *Artcher v. Zeh*, 5 Hill 200; *Peabody v. Speyers*, 56 N. Y. 230; *Allen v. Aguirre*, 7 N. Y. 543. See, also, *Mayer v. Child*, 47 Cal. 142; *Bibend v. Ins. Co.*, 30 Cal. 78. In Indiana the English interpretation of the term "goods" is adopted in *Vawter v. Griffin*, 40 Ind. 593. *Buskirk, J.*, said: "We are very clearly of the opinion that contracts for the sale of evidences of debt and things in action are not within the seventh (English seventeenth) section of

our statute of frauds." In *Whitemore v. Gibbs*, 24 N. H. 484, promissory notes are held not within the statute. And so as to United States treasury checks in Georgia. *Beers v. Crowell*, Dudley 28. In this case the court said: "It is a fair construction of the statute to limit the meaning of the word *goods* to such personal property other than wares or merchandise, as is usually transferred by sale and delivery." In *Walker v. Supple*, 54 Ga. 178, a sale of accounts, however, was held to be within the statute. *Warner, C. J.*, said: "As accounts are made transferable by our law, we think that a contract to purchase an account comes within the reason and spirit of the statute and should be in writing."

"Goods" includes choses in action.

The statute does not apply to a sale of shares in a joint stock banking company, *Humble v. Mitchell*. (a)

Nor to a sale of stock of a foreign state, *Heseltine v. Siggers*. (b)

Nor to a sale of railway shares, *Tempest v. Kilner*, (c) *Bowlby v. Bell*, (d) *Bradley v. Holdsworth*, (e) and *Duncroft v. Albrecht*. (f)

Nor to a sale of shares in a mining company on the cost book principle, *Watson v. Spratley*, (g) *Powell v. Jessop*. (h)

[Nor to a sale of tenant's fixtures, *Lee v. Gaskell*. (i)]

Most of the foregoing decisions went upon the ground that the sales were of choses in action not properly embraced in the words "goods, wares and merchandise," but some turned upon other enactments, to which it will now be convenient to refer. These are, *first*, the fourth

—But the weight of authority in the United States gives the terms "goods, wares and merchandise" a meaning almost commensurate with "personal property." The leading case is *Tisdale v. Harris*, 20 Pick. 9, where the question arose whether an executory sale of shares of stock was within the statute. Shaw, C. J., said: "The words 'goods' and 'merchandise' are both of very large signification. * * * There is nothing in the nature of stocks or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property in the community is now invested in them, and as the ordinary incidents of property arising from delivery and possession cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them." This has since been the law of Massachusetts. See *Baldwin v. Williams*, 3 Metc. 365; *Boardman v. Cutler*, 128 Mass. 388. But in *Somerby v. Buntin*, 118 Mass. 285, the court refused to extend the definition of goods, etc., so far as to take in a patent, Gray, C. J., saying: "The words of the statute have never yet been ex-

tended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." And he says that to include such an interest as that of a patent "would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough." See *Blakeney v. Goode*, 30 Ohio St. 350, 361; *Springfield v. Drake*, 58 N. H. 19. *Tisdale v. Harris* was anticipated in *Riggs v. Magruder*, 2 Cranch C. C. 142, and in *Colvin v. Williams*, 3 Harr. & J. 38, and has been followed in *Gooch v. Holmes*, 41 Me 365; *North v. Forest*, 15 Conn. 400; *Fine v. Hornsby*, 2 Mo. App. 61; *Hudson v. Weir*, 29 Ala. 294. In *Winberry v. Koonce*, 83 N. C. 351, an oral transfer of a judgment was held valid, but the fourth section seems to have been the only one considered, the judgment being held not an interest in land, though a lien upon it.

(a) 11 A. & E. 205.

(b) 1 Ex. 856.

(c) 3 C. B. 249.

(d) 3 C. B. 284.

(e) 3 M. & W. 422.

(f) 12 Sim. 189.

(g) 10 Ex. 222, and 24 L. J., Ex. 53.

(h) 18 C. B. 336, and 25 L. J., C. P. 199.

(i) 1 Q. B. D. 700.

section of the statute of frauds, and *secondly*, the exemption in the stamp act, of agreements relating to the sale of goods, wares, and merchandise.

§ 112. The fourth section (*k*) of the act of 29 Car. II., c. 3, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; ^{Fourth section of statute of frauds.} 2 or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any in-

(*k*) It was held in *Leroux v. Brown*, 12 C. B. 801, and 22 L. J., C. P. 1, that this section is applicable to a contract made in a foreign country. See remarks on this case by Willes, J., in *Gibson v. Holland*, L. R., 1 C. P. 1; 35 L. J., C. P. 5, and *per eundem* in *Williams v. Wheeler*, 8 C. B. (N. S.) 299, 316.

2. **Promise to Pay the Debt of Another.**—This provision of the statute does not prevent one person from buying goods on his own credit, to be delivered to another, without writing. In such cases the important question is to whom was the credit given. If the person receiving the goods is liable to pay for them, then ordinarily the promise of a third person to pay for them is a collateral liability, and not actionable, unless in writing. *Browne on Stat. of Frauds*, § 197; *Clay v. Walton*, 9 Cal. 334; *Nelson v. Boynton*, 3 Metc. 396; *Doyle v. White*, 26 Me. 341; *Hetfield v. Dow*, 27 N. J. L. 440. But if the vendor sells goods solely on the credit of one person, and, at his request, delivers them to another, the former is alone liable, and his liability is not affected by the fourth section of the statute. *Hartley v. Varner*, 88 Ill. 561; *Morrison v. Baker*, 81 N. C. 76; *Turton v. Burke*, 4 Wis. 119; *Thayer v. Gallup*, 13 Id. 539; *Oothaut v. Leahy*, 23 Id. 114; *Johnson v. Hoover*, 72 Ind. 395; *Wills v. Ross*, 77 Ind. 1; *Schoenfeld v. Brown*, 78

Ill. 487.

Effect of Charge on Books of Seller.—The fact that the goods are charged to the person to whom delivered, is not conclusive that they were sold on his credit. *Ruggles v. Gatton*, 50 Ill. 412; *Champion v. Doty*, 31 Wis. 190; *Barrett v. McHugh*, 128 Mass. 165; *Swift v. Pierce*, 13 Allen 136; *Walker v. Richards*, 41 N. H. 388; *Hazen v. Bear-den*, 4 Sneed 48; *Foster v. Persch*, 68 N. Y. 400.

Promise by one who has Assumed the Debt of Another.—A promise to pay the debt of another, which is also the debt of the promisor, or a debt which he is under legal obligation to that other to pay, or a promise to pay for some advantage to himself, is not within the statute. *Estabrook v. Gebhart*, 32 Ohio St. 415; *Barringer v. Warden*, 12 Cal. 311; *Beardslee v. Morgner*, 4 Mo. App. 139; *Landis v. Royer*, 59 Penna. 95; *Townsend v. Long*, 77 Id. 143; *Ind. Manufacturing Co. v. Porter*, 75 Ind. 428.

A Factor's Guaranty is not within the Statute.—A factor's promise to guarantee sales made under a *del credere* commission, is not within the statute. *Wolff v. Koppel*, 5 Hill 458; *Suman v. Inman*, 6 Mo. App. 384; *Bradley v. Richardson*, 23 Vt. 720; *Swan v. Nesmith*, 7 Pick. 220.

terest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, §

8. **Contracts of Sale not to be Performed within a Year.**—If a contract can be performed within a year, without violating its terms, it is not within the statute. In *Walker v. Johnson*, 96 U. S. 424, it appeared that Walker agreed orally to furnish, as required by the builder, all stone for the construction of a lock and dam in the Illinois river. The builder's contract with the canal commissioners required him to finish on or before September 1st, 1871, which was more than a year from the date of Walker's oral contract. The builder sued Walker for breach of the oral contract, and he defended on the ground that the contract was void, because not to be performed within one year. Justice Miller said: "In order to bring a parol contract within the statute, it must appear affirmatively that the contract was not to be performed within the year. In the case of *McPherson v. Cox*, 96 U. S. 404, we said that the statute 'applies only to contracts which, by their terms, are not to be performed within the year, and not to contracts which may not be performed within that time. * * * In this case the lock and dam were to be completed on or before September 1st, 1871. Clearly the contractor had the right to push his work so as to finish it before November, 1870, which would have been within a year from the date of Walker's contract with plaintiff. If plaintiff had a right to do his work within that time, he had a right to require of defendant to deliver the stone necessary to enable him to do it.'" See *White v. Hanchett*, 21 Wis. 415; *Blakeney v. Goode*, 30 Ohio St. 350; *Thomas v. Hammond*, 47 Tex. 42; *Somerby v. Buntin*, 118 Mass. 279, 286. But see *Packet Co. v. Sickles*, 5 Wall. 580, which is criticised in *Somerby v. Buntin* as not "to be reconciled with the general current of authority." See, *contra*, *Patten v. Hicks*, 43 Cal. 509, a doubtful case.

An oral promise not to be performed during the life of some specified person, is not within the provision of the statute, for the person may die within the year. *Frost v. Tarr*, 53 Ind. 390; *Riddle v. Backus*, 38 Iowa 81; *Doyle v. Dixon*, 97 Mass. 208. In some cases it has been held that the statute refers only to contracts not to be performed on either side within a year, and so where goods are to be delivered within the year, and payment to be made after a year, recovery may be had upon the contract. This seems to be the law in England and in several states. *Donellan v. Read*, 3 B. & Ad. 399; *Cheney v. Hamming*, 4 Exch. 631; *Smalley v. Greene*, 52 Iowa 241; *Rake v. Pope*, 7 Ala. 161. But the weight of American authority supports the proposition of *Beardsley, J.*, in *Broadwell v. Getman*, 2 Denio 87, that if the portion of the contract *used* was not to have been performed within the year, no action can be maintained upon it. In *Lapham v. Whipple*, 8 Metc. 59, *Wilde, J.*, says: "To support the action the plaintiff must prove the contract, and the object of this part of the statute was to prevent the proof of verbal agreements when, from lapse of time, the witness might not recollect the precise terms of the agreement." See *Marcy v. Marcy*, 9 Allen 8. *Ch. J. Redfield*, in 1855, criticised *Donellan v. Read*, *supra*, and collected and followed the American authorities up to that date in *Pierte v. Paine*, 28 Vt. 34. This case is approved and followed in *Whipple v. Parker*, 29 Mich. 369, and in *Duff v. Snider*, 54 Miss. 245, this view seems to be preferred. In both of the two cases last cited it is held that if a contract is repudiated for this cause, the other party may recover, not on the contract, but on an implied contract, if he has parted with value to the other. *Emery v. Smith*, 46 N. H. 151; *Browne on Stat. of Frauds*, §§ 290, 290 a.

unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The stamp act, 55 Geo. III., c. 184, in the schedule (re-enacted in the stamp act, 1870,) title "Agreements," exempts from stamp duties every "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandise." Stamp laws.

§ 113. It is often important to determine whether a sale of certain articles attached to the soil, such as fixtures and growing crops, is governed by the seventeenth section as being a sale of "goods, wares, and merchandise," or by the fourth section, as a sale of an "interest in or concerning land." Though these two sections, on a cursory perusal, might seem to be substantially the same, both requiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under the fourth section require a written note or memorandum, under all circumstances, and for any amount or value. But under the seventeenth section, the necessity for the writing does not exist when the value is under £10, and it may be dispensed with in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under the seventeenth section is exempt from stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

§ 114. Complaint has been made at different times of the unsatisfactory character of the decisions in which the courts have sought to establish rules distinguishing with accuracy and certainty whether a contract for the sale of things attached to the soil is or is not a sale of an interest in land within the fourth section. Lord Abinger, in 1842, gave expression to this complaint in a somewhat exaggerated form when he said, "It must be admitted, taking the cases altogether, that no general rule is laid down by any one of them, that is not contradicted by some other." (1)

(1) *Rodwell v. Phillips*, 9 M. & W. 505.

§ 115. Before entering upon an examination of the decisions, it will conduce to a proper understanding of the subject to transcribe in full the remarks of Lord Blackburn on the general principles of law involved in the question.

"The statutes are now applicable to all contracts for the sale of 'goods, wares and merchandise,' words which, as has been already said, comprehend all tangible movable property; I say movable property, for things attached to the soil are not goods, though when severed from it they are; thus, growing trees are part of the land, but the cut logs are goods; and so, too, bricks or stones which are goods, cease to be so when built into a wall—they then become a part of the soil. Fixtures, and those crops which are included amongst emblements, though attached to the soil, are not for all purposes part of the freehold.⁴

4. A Present Sale of Removable Fixtures is not a Sale of an Interest in Land.—*Spencer v. Darlington*, 74 Penna. 286; *Wilkins School Dist. v. Milligan*, 88 Penna. 96, where a recovery was sustained for the price on an oral sale of a school-house to the owner of the land on which it had been erected by his license. *Heysham v. Dettre*, 89 Penna. 506; *Brown v. Morris*, 83 N. C. 251. An agreement that a tenant may remove fixtures placed on land by him is not within the statute. *Powell v. McAshan*, 28 Mo. 70. This subject was considered in the case of *Ross' Appeal*, 9 Penna. 491, where a purchaser of fixtures and machinery from an iron manufacturer defended a suit for the price on the ground that there was a judgment lien which bound the fixtures as part of the land. *Bell, J.*, said: "As such things may be disjoined by the owner of the freehold and thus restored to their original character of personal chattels, there is nothing in the law prohibiting a sale of them as personalty. In the absence of fraud, parties so treating them with a knowledge of the circumstances that attend them, necessarily assume any risk consequent upon their present relation. As between such parties they are to be regarded as dissevered.

This, as a general rule, results from the nature of what is technically denominated a fixture, though capable of amotion. Primarily a thing personal, it becomes for some purposes, in legal contemplation, incorporated with things real by simple annexation, and may, while this continues, be the subject of an estate in or an encumbrance on lands. The moment it is dissolved by a complete severance, this artificial character is dropped, and as a movable, it again assumes its natural relations." See *Smith v. Waggoner*, 50 Wis. 155. In Massachusetts, where manure accumulated on a farm in the ordinary course of husbandry is held to be realty, the question arose as to the validity of an oral reservation of it on sale of a farm. In *Strong v. Doyle*, 110 Mass. 92, *Colt, J.*, said: "An oral contract for the sale of it is valid. In the case of fixtures which are not incorporated with, but merely annexed to the freehold, the rule is well settled that the statute does not apply." In *Bostwick v. Leach*, 3 Day 476, an oral sale of machinery in a mill was sustained. This was followed in Alabama and extended to an oral sale of a house. *Foster v. Mabe*, 4 Ala. 402; *Scoggin v. Slater*, 22 Ala. 687. But in Connecticut an oral sale of a house was

§ 116. "It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. IV., c. 14, (m) if not of the 29 Car. II., c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold; it is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? For in general that is a good test of whether they

not sustained. *Landon v. Platt*, 34 Conn. 517. In *Pea v. Pea*, 35 Ind. 387, the question arose with reference to a steam saw-mill and machinery. The court, after referring to the conflict of authority, said: "While it was a fixture it cannot be regarded as a permanent one, but was intended to be removed from point to point, it being more convenient to remove the mill than to haul the saw-logs to the mill. We think under these circumstances there may have been a reservation by parol." In *Smith v. Odam*, 63 Ga. 499, a parol reservation of a cotton-gin and gear on sale of land and building was held valid. But see, *contra*, *Latham v. Blakely*, 70 N. C. 368, and *Bond v. Coke*, 71 N. C. 97, where a cotton-gin, though removable, was held not to pass by an oral sale; and see *Conner v. Coffin*, 22 N. H. 538, where manure on a farm sold was held to pass with the land notwithstanding an oral reservation. See, also, *Rogers v. Gilinger*, 30 Penna. 185.

A Present Sale of Fixtures not Severed is a Sale of an Interest in Land.—In *Meyers v. Schomp*, 67 Ill. 469, a sale of a brick building partly destroyed by fire was held within the stat-

ute. The court said that so far as materials were severed by the fire they were personalty, but as part of the building stood, the contract being entire and embracing realty, was not actionable. In *Noble v. Bosworth*, 19 Pick. 314, the vendor of land verbally reserved dye-kettles set in brick in a dye-house. *Held*, that the kettles passed, not having been severed. This case is distinguished in *Strong v. Doyle*, 110 Mass. 92, on this ground of no severance. See *Landon v. Platt*, 34 Conn. 517; *Lyle v. Palmer*, 42 Mich. 314; *Detroit, &c., R. R. v. Forbes*, 30 Mich. 165; *Trull v. Fuller*, 28 Me. 545. A similar case to that of *Meyers v. Schomp*, *supra*, is that of *Walton v. Jarvis*, 13 U. C. Q. B. 616, and 14 U. C. Q. B. 640, where a steam saw-mill was burned, and the engine and boilers being left on brickwork were held realty until severance, an oral sale being a license to enter and detach the goods. In *Patton v. Moore*, 16 W. Va. 428, where a flood washed out of a mill an engine, boiler, mill-stones and fixtures, they were held to be still realty. As to emblements, see notes 5, 6 and 7.

(m) Lord Tenterden's act, *ante* § 93.

intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. IV., c. 14, a contract for the sale of goods, wares and merchandise, within the seventeenth section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the seventeenth section of the statute of frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the fourth section, which may, however, be the case, though it is not a sale of goods, wares and merchandise, within the seventeenth." (n)

Nothing is to be found in the cases reported since this perspicuous exposition was published, to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities then extant. There can be little hazard, therefore, in laying down the rules that govern this subject, supporting them by the appropriate decisions, and calling attention to such cases as seem to conflict with the general current of authority.

§ 117. *The first principle then is*, that an agreement to transfer the property in anything attached to the soil at the time of the agreement, *but which is to be severed from the soil, and converted into goods*, BEFORE the property is transferred to the purchaser, is an agreement for the sale of goods, an executory agreement, governed by Lord Tenterden's act, and therefore within the seventeenth section. (o) ⁵

First principle.

Where growing crop is to be severed before property passes.

(n) Blackburn on Sales 9, 10. As to a sale of fixtures, see *Lee v. Gaskell*, 1 Q. B. D. 700; post § 129. "The principle seems to be that a sale of fixtures is the sale of a right to sever during the tenancy," per Cockburn, C. J., at p. 701.

(o) See post § 127.

5. Are Executory Sales of Natural Products of the Soil within the Fourth Section of the Statute of Frauds?—The principle of the text is fully adopted in Massachusetts and several other states, and is repudiated in others. This principle, if admitted, involves important

consequences. If such sale is a valid sale of goods, it can be enforced by suit on the contract for damages if broken, or perhaps by bill for specific performance, if the property is specific. Even if the contract is in form a present sale, with definite provision for removal of the property, it will be construed as executory. In the language of Colt, J., in *White v. Foster*, 102 Mass. 375, 379: "A simple oral contract for the sale of trees, to be removed in a definite time, would be construed as not intended to convey any interest in the land, because the

In *Smith v. Surman* (p) the agreement was to sell standing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. Held to ^{Smith v. Surman.} be within the seventeenth section. Bayley, J., in referring to this

parties must have known that such could not be its effect." See this case further quoted, *infra*. If the principle of the text is carried to its logical conclusion, it involves the further consequence that an oral sale of specific standing timber, grass or other natural produce includes a license to the buyer to enter and take the object of sale, and that such license, being coupled with an interest, is irrevocable, as is held in the case of sales of *fructus industriales*. *Miller v. State*, 39 Ind. 267. This conclusion is not admitted in Massachusetts, because it involves a palpable violation of the statute; but is not such violation necessarily involved by admitting the principle of the text? This principle is founded on a distinction between executory and present sales, similar to the distinction formerly taken under the seventeenth section, but long since abandoned. § 93, note 3, *supra*. The seventeenth section has been extended by our courts to executory contracts of sale on the ground that they are within the mischief to be prevented by the act. The same reason applies with full force to executory contracts of sale of natural produce and unsevered fixtures, (*Harrell v. Miller*, 35 Miss. 700,) and, as will be seen, such contracts are held within the fourth section by the weight of American authority, notwithstanding that the courts of Massachusetts, and perhaps of Pennsylvania, and other courts to which we are accustomed to look for the law, have sustained the English rule as laid down by our author in the text. The earliest Massachusetts case where the principle of the text was defined, and the one usually cited in its

support in this country, is *Claffin v. Carpenter*, 4 Metc. 580, 583, where Wilde, J., said: "A contract for the sale of standing timber to be cut and severed from the freehold by the vendee, does not convey to him any interest in the land within the meaning of the statute. Such a contract is to be construed as passing an interest in the trees when they are severed from the freehold, and not any interest in the land." Followed in *Nettleton v. Sikes*, 8 Metc. 34. In *Stearns v. Washburn*, 7 Gray 187, the suit was for growing grass sold to defendant by an oral sale for \$7, but which the defendant had neither taken nor paid for. The court said that until severed the grass was realty, and the plaintiff could not maintain an action on the common counts for goods sold, "*but that he should have declared specially on the contract of sale.*" *Giles v. Simonds*, 15 Gray 441, is similar in principle, holding that an oral contract of sale of standing timber is a license to enter on the land to cut it, which may be revoked before it is executed, but not as to any timber cut before revocation; but that such revocation will be a breach of the oral contract, for which damages may be recovered. See, also, *Drake v. Wells*, 11 Allen 141; *Poor v. Oakman*, 104 Mass. 309; *White v. Foster*, 102 Mass. 375. In this last case, Colt, J., said: "When cases have arisen under parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, such agreements, with reference to the statute of frauds, and in order to give effect to them, have been construed as not intended by the parties to convey any interest in land, and therefore not

case, in *Earl of Falmouth v. Thomas*, (g) lays stress on the fact, "that the *seller* was to cut down; the timber was to be made a chattel by

within the statute. Such contracts are held to be, at least, executory contracts for the sale of chattels, as they shall be thereafter severed from the real estate with a license to enter on the land for the purposes of removal." In Maine the law seems to be similar to that of Massachusetts, though the question has not been recently considered. *Erekin v. Plummer*, 7 Me. 447; *Cutler v. Pope*, 13 Me. 377. In *Smith v. Bryan*, 5 Md. 141, the court held a sale of standing timber to be a sale of goods only, within the contemplation of the parties, whether to be severed by vendor or vendee, quoting and adopting 1 Greenl. Ev., § 271. In this case, however, the trees had been cut before any dispute arose. In *Purner v. Piercy*, 40 Md. 212, the suit was for peaches sold on the trees, and they were held to belong to the class of *fructus industriales*, and on that ground were held goods, and within the seventeenth and not the fourth section. Stewart, J., however, going beyond the requirements of the case, said: "Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether to be severed from the soil by the vendor or to be taken by the vendee, under a special license to enter for that purpose, it is still, in contemplation of the parties, a sale of goods only and not within the statute." A similar principle was laid down in Pennsylvania, where the law is stated in *McClintock's Appeal*, 71 Penna. 366, as follows, by Williams, J.: "In agreements for the reservation or sale of growing timber, whether the timber is to be regarded as personal property or an interest in real estate depends on the nature of the contract and the intent of the parties. If the agreement does not contemplate the immediate severance of

the timber, it is a contract for the sale or reservation of an interest in land, and until actual severance the timber in such case passes to the heir and not to the personal representative. But when the agreement is made with a view to the immediate severance of the timber from the soil it is regarded as personal property, and passes to the executor or administrator and not to the heir. * * * The distinction between contracts made with a view to the immediate severance of the timber and those which are not, is taken in the later authorities." Cites *Smith v. Surman*, 9 B. & C. 567, and *Crosby v. Wadsworth*, 6 East 602. In the case of *McClintock's Appeal* the timber was to be cut and removed on thirty days' notice from the owner of the land, and the interest of the owner of the timber was held to be a chattel interest and to pass on his death to his administrator. But this case raises no question as to the effect of an oral sale. See *Pattison's Appeal*, 61 Penna. 294, stated in note 6, *infra*. The Massachusetts case of *Clafin v. Carpenter* was cited and followed in Kentucky in the case of *Cain v. McGuire*, 13 B. Mon. 340. An oral sale of trees made in prospect of their immediate removal by the vendee, was sustained as a sale of timber as chattels and not as lands, and the vendor having by injunction restrained the buyer from severing and removing the trees, was held liable for damages on his injunction bond. This is followed in *Byassee v. Reese*, 4 Metc. (Ky.) 372. Marking the growing trees by vendor was said to be constructive delivery of the trees regarded as chattels. In *Slocum v. Seymour*, 36 N. J. L. 138, Bedle, J., said: "It may be conceded, and such is the law, as in the case of *Smith v. Surman*, 9 B. & C. 561, that

(g) 1 C. & M. 105.

the *seller*," [but this distinction has since been held to be immaterial, *Marshall v. Green*, 1 C. P. D. 35, *post* § 127.]

there may be a valid *parol* contract for the sale of timber as a chattel, where it is to be cut and delivered by the vendor, although designated as being upon certain land, and where the contract contemplates no property to the vendee in the trees until after they are actually cut down and reduced to chattels; yet where the sale is of an interest in the trees standing, such a sale is of an interest in lands within the meaning of the statute of frauds." But as before stated the doctrine of the text is by no means generally accepted in America. On the contrary, the weight of authority seems to support the following proposition.

An Oral Sale of Growing Trees or other Fructus Naturales, whether Present or Executory, is a Sale of an Interest in Land and within the Statute. Such Sale is a mere Revocable License.—The leading American case is *Green v. Armstrong*, 1 Denio 550, (1845.) Beardsley, J., said: "The precise question in this case is whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land." After remarking on the conflict of authorities in other states and in England, the question being new in New York, and defining land, the learned judge continued: "An interest in that which is land can only be created by deed or written conveyance, and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land, and not his personal chattels. The contract for their sale and transfer, being by

parol, was therefore void." Cites *Dunne v. Ferguson*, 1 Hayes (Irish) R. 542. *Green v. Armstrong* is cited in *McGregor v. Brown*, 10 N. Y. 117, and is said to be the settled law of the State of New York. In *Pierrepoint v. Barnard*, 6 N. Y. 292, *Green v. Armstrong* is stated to be "undoubtedly good authority to prove that standing trees were part of the land, and that a *parol* contract for the sale of them, while it remained executory, was within the statute." *Pierrepoint v. Barnard*, and the later cases of *Kilmore v. Howtell*, 48 N. Y. 569, and *Boyce v. Washburn*, 4 Hun 792, hold that where, under an oral contract, timber has been severed, before revocation of the license by vendor, the buyer obtains title to the severed timber. *Green v. Armstrong* was also followed in *O'Donnell v. Brehen*, 36 N. J. L. 237. In *Buck v. Pickwell*, 27 Vt. 158, growing trees were bought orally and paid for, and in part removed, when a purchaser of the land interfered and cut some of the trees sold, and the buyer of the trees brought trespass. The court held that the contract was in no manner available, though, if the purchaser actually cut trees, they would, when severed, become his. The court refuses to follow *Clafin v. Carpenter*, or *Erskine v. Plummer*, *supra*. *Buck v. Pickwell* is commented on and approved in *Fitch v. Burk*, 38 Vt. 687. In *Kingsley v. Holbrook*, 45 N. H. 313, it was decided that an agreement to sell growing trees, with a right to cut and remove them at a future time, whether fixed or indefinite, must be in writing. This was followed in *Howe v. Batchelder*, 49 N. H. 204, and it was held further that the license which such oral sale gives, is not assignable. In Wisconsin the question was raised, but not decided in *Young v. Lego*, 36 Wis. 394. In *Daniels v. Bailey*, 43 Wis. 566, it was held that a sale of an interest in standing timber, or of an in-

In *Parker v. Staniland*^(r) the sale was by the plaintiff of all the potatoes on a close of two acres, at 4s. 6d. a sack, and the defendant was to get them immediately. Here, also, it was held that there was a sale of chattels, and no transfer of any

*Parker v.
Staniland.*

terest in a written contract of sale of standing timber, by parol and unexecuted, was void under the statute of frauds, as a sale of an interest in land. A very full discussion of this subject will be found in *Owens v. Lewis*, 46 Ind. 488. In that case plaintiff sued for trespass for cutting his trees. Defendant answered that he had selected one hundred and six trees on the land of plaintiff, and that plaintiff "then and there sold and delivered" them to defendant for \$2000, payable within a limited time. That defendant made due tender, but plaintiff refused to accept the money, and notified defendant not to cut the trees, which notice defendant disregarded and proceeded to cut the trees sold him. Plaintiff demurred, on the ground that the sale set forth in the answer was within the fourth section, and, also, on the ground that it was within the seventeenth section of the statute, and the demurrer was sustained. Buskirk, J., said: "A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, as in this case, will amount to a license for the vendee to enter upon the vendor's land, for the purpose of making such severance, and if such license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after severance will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such contract." The court further held that if the

sale was of the trees as chattels, it was void within the seventeenth section. This was followed in *Armstrong v. Lawson*, 73 Ind. 498, where an oral reservation of a tree on sale of land was held a mere license, to enter and cut it, which became null when revoked. See *Kerr v. Connell*, Berton (N. B.) 133, where it was held that a license to cut and remove certain trees gave no interest in them until cut, and therefore the licensee could not maintain trover against one who wrongfully cut and removed them. In *Green v. North Carolina R. R.*, 73 N. C. 524, the contract was for the sale of twenty-four hundred cords of wood, to be cut by the buyer, who cut and carried it away and defended for the price, on the ground that the contract was an oral sale of realty. Settle, J., said: "It is conceded that an executory contract to sell growing trees is within the statute of frauds. *Misell v. Burnett*, 4 Jones 249. * * * But as the contract has been complied with to the extent that the defendant has got the plaintiff's wood, we see no reason why the plaintiff should not recover the value of the wood. The contract amounted to a license to the defendant from the plaintiff, to enter his land and cut and cord wood. As soon as the wood was cut it became personal property, and it matters not whether the plaintiff himself cut and corded the wood he sold to the defendant, or whether under the contract he used the labor of the defendant to cut and cord it." In *Harrell v. Miller*, 35 Miss. 700, *Green v. Armstrong* is followed, Handy, J., saying: "An agreement for the sale of timber growing on the land, giving to the vendee the right to enter

(r) 11 East 362.

interest in the land; but both Lord Ellenborough and Mr. Justice Bayley put the case on the ground that the potatoes were to be taken away *immediately*, and to gain nothing by further growth in the soil; (s) and they made this fact the ground for distinguishing the case from Crosby v. Wadsworth, (t) and Waddington v. Bristow, (u) where sales of growing crops of grass had been held to come under the fourth section.

In Warwick v. Bruce, (x) decided by the King's Bench in 1813, which was followed by Sainsbury v. Matthews, (y) in the Exchequer, in 1838, the sale was of potatoes *not mature*, and that were to be dug by the *purchasers* when ripe, in the former case for a gross sum, and in the latter at 2s. per sack; and in both cases the distinctions suggested in Smith v. Surman, and Parker v. Staniland, were disregarded; and the sale in Warwick v. Bruce was held not to be of an interest in land under the fourth section, while the decision in the Exchequer case went the full length of deciding that the sale was one of goods and chattels, governed by the seventeenth section. The distinction between crops of mature and immature *fructus industriales* was also expressly repudiated by Littledale, J., in Evans v. Roberts. (z)

§ 118. In Washburn v. Burrows, (a) where the pleadings averred that certain crops of grass, growing on a particular estate, were assigned as security, it became necessary to inquire whether this averment necessarily implied the transfer of an interest in land. The court, after taking time to consider, intimated that this plea would be satisfied by proving that the grass was to be severed from the soil, and delivered as a chattel. Rolfe, B., in delivering the

upon the land and cut the timber, appears to come fully within the mischief intended to be prevented by the statute." In Ohio the question was raised, but not decided, in Carrier v. Gordon, 21 Ohio St. 596, 604. In Powers v. Clarkson, 17 Kan. 218, plaintiff sued for destruction of wild grass on land of his wife, claiming to own the grass under a parol agreement with her. The court held the transfer void, under the statute, as an interest in land, and said: "It could at most operate only as a license to him to convert the grass to his own use, and to protect him from any action brought by her to re-

cover from him for the grass, or for trespassing upon her land." In Knox v. Haralson, 2 Tenn. Ch. 232, 237, it is said that an agreement to sell a certain number of cords of wood, yet standing in the tree, is within the statute as a sale of interest in land.

(s) Marshall v. Green, 1 C. P. D. 35.

(t) 6 East 602.

(u) 2 B. & P. 452.

(x) 2 M. & S. 205.

(y) 4 M. & W. 434.

(z) 5 B. & C. 836.

(a) 1 Ex. 107.

judgment, said: "Certainly, where the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel." (b)

§ 119. In most of the foregoing cases it will be observed, that under the contracts the property in the thing sold remained in the vendor till after severance. In *Smith v. Surman*, the price depended on the measurement of the timber after cutting it, for it was sold at so much a foot; and in *Parker v. Staniland*, and *Sainsbury v. Matthews*, the potatoes were also to be measured after being gathered, in order to determine the price. If the thing sold had been destroyed before measurement, the loss would have fallen on the vendor, because the property remained in him. *Post*, Book II., ch. III. The bargain therefore was simply that the things sold were to be severed and converted into chattels before the sale took effect, and fell under the first principle above stated. But *Warwick v. Bruce* is governed by the rule next to be stated.

§ 120. The second principle on this subject is, that where there is a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, as grass, timber, fruit on trees, &c., &c., which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labor of man, in sowing and reaping, planting and gathering. The former are an interest in land, embraced in the fourth section;⁶ the latter are chattels, for at common law a growing crop, produced by the labor and expense of the occupier of

Second principle. Where property passes before severance.

If *fructus naturales*, fourth section applies.

(b) See per Grove, J., in *Marshall v. Green*, 1 C. P. D. 44.

6. *Fructus Naturales*.—See note 5, *supra*. In *Pattison's Appeal*, 61 Penna. 294, 297, an oral contract was made for standing timber to be taken off by the purchaser at his discretion as to time. *Thompson, C. J.*, said: "We regard a contract for the standing timber on a tract of land, to be taken off at discretion as to time, as an interest in land, and within

the statute of frauds, the transmission of which must be by writing. The distinction in the English books between the *prima vestura* and the *fructus industriale* of land, namely the natural, growths and the products of agriculture, has always been regarded with us. In *Yeakle v. Jacob*, 9 Casey 376, this court held that a grant to one of a perpetual right to enter and cut timber on another's land, for the purpose of repairing fences, was

lands, was, as the representative of that labor and expense, considered an independent chattel. (c) ⁷

§ 121. The first and leading case in which this distinction was fully considered was *Evans v. Roberts*. (c) A verbal contract was made, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of £5, and the defendant paid one shilling earnest. The action was *assumpsit* "for crops of potatoes bargained and sold," and it was ob-

If fructus industriales, seventeenth section applies

Evans v. Roberts.

within the statute. This case was cited and applied in *Huff v. McCauley*, 53 Penna. 206. We think the principle of them is indisputable."

(c) Per Bayley, J., in *Evans v. Roberts*, 5 B. & C. 836.

7. *Fructus Industriales*.—It is settled that "growing crops of grain and vegetables, *fructus industriales*, being goods and chattels and not real estate, may be conveyed by a verbal contract, as they may be sold on execution as personal chattels." *Backenstoss v. Stahler*, 33 Penna. 251, 255, quoting *Green v. Armstrong*, 1 Denio 550, 554. See *Hershey v. Metzgar*, 90 Penna. 217. It must be remembered that the seventeenth section is not law in Pennsylvania. In *Turner v. Piercy*, 40 Md. 212, the above language of Benjamin on Sales is cited, but the sale of peaches on the trees is sustained by classing peaches with *fructus industriales*. See note to § 131, *infra*. In *Brown v. Sanborn*, 21 Minn. 402, the contract was in writing for the flax-straw to be raised from forty-five bushels of flax-seed. The plaintiff claimed that there was a subsequent oral modification of this agreement, but the court, citing Benjamin on Sales and *Watts v. Friend*, held that the contract was for the sale of goods for the price of \$50 or more, and therefore could not be varied by parol. In *Ross v. Welch*, 11 Gray 235, an oral sale of growing cabbages was made at a fixed price, and afterwards the buyer accepted and took away part. In a suit for

the price of the whole, the buyer set up the statute of frauds, and offered to pay for so many as he had taken. But the court held that there was no interest in land sold, and that there had been part acceptance, and gave judgment for the whole. See *Delaney v. Root*, 99 Mass. 546. In *Westbrook v. Eager*, 16 N. J. 81, a crop of growing rye was sold, and afterwards the farm, and the buyer of the farm cut the rye, and was sued in trover for the value. *Ryerson, J.*, said: "I have no difficulty in coming to the conclusion that the purchase by parol of a growing crop of grain, acquires a good title, not only against the seller, but all other persons subsequently claiming under him." This case was approved in *Bloom v. Welsh*, 27 N. J. 177, but in that case the grain was sold after levy of execution on the land, and it was held that the title of the purchaser under the execution dated back to the levy, and therefore included the growing grain. In New York, the case of *Green v. Armstrong*, 1 Denio 554, set forth the doctrine that growing crops were chattels, and might be sold by parol. This is approved in *Harris v. Frink*, 49 N. Y. 24, and it was there held that one who went into possession of land under a parol contract for its purchase, might recover for his crops, if taken away from him by the owner. In *Bull v. Griswold*, 19 Ill. 631, 633, it was held to be undoubtedly well settled that growing crops are so far personal property that they may be sold and

jected that this was a contract of sale of an interest in or concerning land, within the meaning of the fourth section of the statute of frauds.

Bayley, J., said, "I am of opinion that in this case there was not a contract for the sale of any lands, tenements or hereditaments, or any interest in or concerning them, but a contract only for the sale or delivery of things, which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; *the vendor was to raise the potatoes from the ground*, at the request of

transferred by parol. "If this wheat was sold by parol, that vested good title, and the possession also, until it was time to harvest it, because the law could not require him to take manual possession before that time." This is approved in *Graff v. Fitch*, 58 Ill. 373. And under the law of Illinois that possession must be taken of property sold, or the sale will be deemed fraudulent as against creditors, a transfer of growing crops is, nevertheless, good, for no actual delivery is practicable until harvest time. *Thompson v. Wilhite*, 81 Ill. 356; *Ticknor v. McClelland*, 84 Ill. 471; *Robbins v. Oldham*, 1 Duv. (Ky.) 28. To the same effect, under the California statute making sales without delivery void against a subsequent *bona fide* purchaser, see *Davis v. McFarlane*, 37 Cal. 634. This case also holds a sale of growing grain not a sale of an interest in land within the meaning of the statute of frauds. "view of the fact that leases for a year and less are excepted from the operation of the statute, we consider that a contract for the sale of growing crops—the products of periodical cultivation—is not affected by the statute, although it may confer upon the purchaser an exclusive right to the land while the crop is ripening and being harvested." Part payment having been made, no question was raised under the seventeenth section. *Marshall v. Ferguson*, 23 Cal. 65, was a case of an oral sale of growing grain for \$650, and a suit for the price. The defence was made under both the fourth and seven-

teenth sections of the statute of frauds. The court held that the sale was not of real estate, citing *Green v. Armstrong*, *supra*, but was of goods and chattels and within the seventeenth section, but that it had been taken out of the statute by a resale by defendant. In *Cutler v. Pope*, 13 Me. 377, grass ready to cut was sold by parol and the sale was held valid, a distinction being taken between a ripe crop and one for ripening which continued use of the land was necessary, and this is followed in *Bryant v. Crosby*, 40 Me. 9, 23, where, however, the crops in question were grain. The distinction between *fructus industriales* and *fructus naturales* is not drawn in these Maine cases, but it is adopted in New Hampshire. See *Kingsley v. Holbrook*, 45 N. H. 313; *Pitkin v. Noyes*, 48 N. H. 294, and *Howe v. Batchelder*, 49 N. H. 204; *Purner v. Piercy*, 40 Md. 212, stated in note to § 181, *infra*; *Britain v. McKay*, 1 Ired. 265. In *Bowman v. Conn*, 8 Ind. 58, there was a parol contract to sell and deliver at \$60 per ton all the broom corn to be raised on twenty-five acres of land. The suit was brought for failure to deliver, and the defence was the statute of frauds, seventeenth section. *Held*, on the authority of *Watts v. Friend*, 10 B. & C. 446, that no suit could be maintained. See *Weatherby v. Higgins*, 6 Ind. 73; *Sherry v. Picken*, 10 Ind. 375. In *Miller v. The State*, 39 Ind. 267, it was held that after a sale of a growing crop, the vendor cannot revoke the buyer's license to go upon the land and gather it.

the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument to show that this contract gave the vendee an interest in the land, within the meaning of the fourth section of the statute of frauds, are distinguishable from the present case. In *Crosby v. Wadsworth*, (d) the buyer did acquire an interest in the land, for by the terms of the contract, he was to mow the grass, and must therefore have had possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*; it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold, (e) and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant: and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the statute of frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them." And again, at p. 835, "It has been insisted that the right to have the potatoes remain in the ground is an interest in the land, but the party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice 1039 it is laid down that under a *fi. facias* the sheriff may sell *fructus industriales*, as corn growing which goes to the executor, or fixtures, which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor, and those which go to the heir. The former may be seized and sold under the *fi. fa.*, the latter cannot. *The former must, therefore, in contemplation of law, be considered chattels.*"

At the close of his opinion, the learned judge said: "I am of .

(d) 6 East 602.

(e) Com. Dig., tit. *Biens* (G.)

opinion that there was not in this case any contract or sale of lands, &c., *but that there was a contract for the sale of goods, wares and merchandise, within the meaning of the seventeenth section*, though not to the amount which makes a written note or memorandum of the bargain necessary."

Holroyd, J., said: "The contract being for the sale of the *produce* of a given quantity of land, was a contract to render what afterwards would become a chattel."

Littledale, J., was as explicit as Bayley, J., in taking the distinction above pointed out. He said, at page 840: "This contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. * * * Lord Coke in all cases distinguishes between the land and the growing produce of the land; he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labor and expense,) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land within the meaning of the fourth section of the statute of frauds; *but a contract for the sale of goods, wares and merchandise, within the seventeenth section of that statute.*"

§ 122. In *Jones v. Flint*, (*f*) decided in 1839, *Evans v. Roberts* was followed and approved, on the ground of the distinction between *fructus industriales*, which are chattels, and the natural growth of grass, &c., which are part of the freehold; and any distinction between crops mature and immature, as well as between cases where the buyer or the seller is to take the crop out of the ground, was expressly rejected. In both cases also the earlier *dictum* (*g*) of Sir James Mansfield in *Emmerson v. Heelis* (*h*) is practically overruled.

The two cases of *Evans v. Roberts* and *Jones v. Flint* have remained unquestioned to the present time as authority for the rule that *fructus industriales*, even when growing in the soil, are chattels; while another series of decisions has maintained the principle that the

(*f*) 10 Ad. & E. 753.

not merely a *dictum* but a decision.

(*g*) But see Blackburn on Sale 19,
note, where the author shows that it is

(*h*) 2 Taunt. 38.

natural growth of the land is part of the freehold, and that contracts for the sale of it, transferring the property before severance, are governed by the fourth section.

§ 123. In *Rodwell v. Phillips*, (i) a written sale of "all the crops of fruit and vegetables of the upper portion of the garden, from the large pear trees for the sum of £30," the purchaser having paid down £1 as deposit, was held by Lord Abinger to be the sale of an interest in land; but the *ratio decidendi* was that it certainly was not such a contract for the sale of goods, wares and merchandise, as under the stamp act was exempted, and the plaintiff was nonsuited, the agreement not being stamped. *Rodwell v. Phillips.*

§ 124. In *Carrington v. Roots*, (k) plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain close, to be cleared by the end of September, at £5 10s. per acre; half the price to be paid down before any of the grass was cut. Held by all the judges, to be void under the fourth section. This case is in entire conformity with *Crosby v. Wadsworth*, (l) where Lord Ellenborough held a similar contract to be an agreement for the sale of an interest in land, "conferring an exclusive right, to the vesture of the land during a limited time and for given purposes." *Carrington v. Roots.*
Crosby v. Wadsworth.

In *Scovell v. Boxall*, (m) a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in *Teal v. Auty*, (n) an unstamped agreement for the sale of growing poles, were held to be agreements for the sale of an interest in land. In the former case, Hullock, B., cited with approval, and recognized as authority, the case of *Evans v. Roberts*. (o) *Scovell v. Boxall.*
Teal v. Auty.

§ 125. In all these cases it will be remarked that the distinction pointed out by Lord Blackburn in his treatise is found to prevail, In *Rodwell v. Phillips*, the whole crop of fruit on the trees; in *Carrington v. Roots*, and *Crosby v. Wadsworth*, the whole growth of grass on the land; and in *Scovell v. Boxall*, and *Teal v. Auty*, the standing undergrowth, and the growing poles, were all transferred to the purchasers *before severance* from the soil. ⁸

(i) 9 M. & W. 502.

(k) 2 M. & W. 248.

(l) 6 East 602.

(m) 1 Y. & Jerv. 396.

(n) 2 Br. & B. 101.

(o) 5 B. & C. 838.

8. Note, however, *White v. Foster*, 102 Mass. 378, that it is the proper construction of such sales that the parties do not contemplate a transfer before severance. See this case stated in note 5, *supra*.

§ 126. From all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz. :—

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the fourth section of the statute of frauds.⁹ Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the fourth section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the seventeenth, and not by the fourth section of the statute.¹⁰

§ 127. [In the recent case of *Marshall v. Green* (o) the facts were very similar to those in *Smith v. Surman* (*ante* § 117), except that the timber was to be cut down by the PURCHASER and removed by him *as soon as possible*. (p) Held, that the agreement was not a contract *for an interest in land* within the fourth section, and that as there was no intention that the purchaser should derive any benefit from the continuance of the timber in the soil, it was immaterial whether the seller cut and delivered the timber to the purchaser, or the purchaser entered upon the land and cut it for himself.

In the judgment of Brett, J., will be found an exposition of the tests applicable to this class of cases. (q)

The decision in *Marshall v. Green* seems open to some criticism. It must be supported either on the ground that it falls within the first principle (*ante* § 117), viz., that the property in the timber was not to pass until it had been cut down, and that this was the inference drawn from the words “to be cut down as soon as possible,” or else it must be taken to have introduced a limitation upon the second principle (*ante* § 120), viz., that even when the property passes before severance in *fructus naturales*, yet if the evidence shows that they are

9. See note 7, *supra*.

10. See notes 5 and 6, *supra*.

(o) 1 C. P. D. 35.

(p) It is to be observed, however, that in *Smith v. Surman* the contract was not

one for the sale of growing timber, but for the sale of timber *at so much per foot*, i. e., after its conversion into chattels.

(q) Following *Wms. Saund.*, vol. 1, p. 394, notes to *Duppa v. Mayo*.

to gain nothing by further growth in the soil, then to sell them as they stand is not a sale under the fourth, but under the seventeenth section.

Brett, J., says (at p. 42), "Where the things are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining: then part of the subject matter of the contract is the interest in land, and the case is within the section."

And Grove, J., (at p. 44), "Here the trees were to be cut down as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a "warehouse" for the trees during that period."]

§ 128. Whether *fructus industriales* while still growing are not only chattels, but "goods, wares, and merchandise," has not, it is believed, been directly decided. (r) ¹¹ Both Bayley, J., and Littledale, J., expressed an opinion in the affirmative in *Evans v. Roberts* (*supra*, §§ 121, 122), and Mr. Taylor, in his treatise on Evidence, (s) treats the proposition as being perfectly clear in the same sense. Lord Blackburn, on the contrary, (t) says that the proposition is "exceedingly questionable," and that no authority was given for it in *Evans v. Roberts*. Mr. Taylor cites no authority for his opinion. The cases bearing on this point are *Mayfield v. Wadsley*, (u) and *Hallen v. Runder*. (x) In the former, an outgoing tenant obtained a verdict, which was upheld, on a count for crops bargained and sold against an incoming tenant, who had agreed to take them at valuation; and in the latter, counts for fixtures bargained and sold were held sufficient, but Lord Blackburn observes on these cases, first, that in *Hallen*

Are *fructus industriales* goods, &c., while growing.

Mayfield v. Wadsley.

Hallen v. Runder.

(r) See *Glover v. Coles*, 1 Bing. 6; and *Owen v. Legh*, 3 B. & Ald. 470, both being cases of distress for rent.

11. Growing crops, though unripe, held to be goods within the meaning of the seventeenth section. *Turner v. Piercy*, 40 Md. 212. See, also, *Sherry v. Picken*, 10 Ind. 375; *Marshall v. Ferguson*, 23 Cal. 69; *Backenstoss v. Stahler*, 33 Penna.

251; *Westbrook v. Eager*, 16 N. J. 81; *Reed v. Johnson*, 14 Ill. 257; *Cradock v. Riddlesbarger*, 2 Dana (Ky.) 204. See note 7, *supra*.

(s) Taylor on Ev. 875, § 1043, (ed. 1878.)

(t) Blackburn on Sale 19, 20.

(u) 3 B. & C. 357.

(x) 1 C., M. & R. 267.

v. Runder the court expressly decided that an agreement for the sale of fixtures, between the landlord and the outgoing tenant, was not a sale of *goods*, either within the statute of frauds, or the meaning of a count for goods sold and delivered; and, secondly, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor's right to diminish the value of the land than a sale of anything. The learned author, in another passage, (y) says that "they are certainly chattels, but they are not *goods*, but are so far a part of the soil, that larceny at common law could not be committed on them;" and Lord Ellenborough was also of this opinion. (z) This point must, it is apprehended, be considered as still undetermined.

§ 129. [In *Lee v. Gaskell*, (a) upon a tenant's bankruptcy his trustee sold the fixtures to the plaintiff, who resold them to the defendant, the bankrupt's landlord. Held, following *Hallen v. Runder*, that the sale did not fall within either the fourth or the seventeenth section of the statute. "Fixtures," says Cockburn, C. J., "although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold, so as to become goods and chattels."

In *Lee v. Gaskell*, as in *Hallen v. Runder*, the fixtures were bought by the landlord, the only distinction between the cases being that in *Lee v. Gaskell* there had been an intermediate sale by the tenant's trustee. It remains, however, to be decided whether, on a purchase of fixtures by a person who is not the landlord, the sale does not fall within the seventeenth section, although, in the passage above cited, Cockburn, C. J., takes the contrary view. And by an interlocutory remark (at p. 701), he indicates an opinion that the sale of fixtures is nothing more than the sale of the right to sever.]¹²

§ 130. It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of crops.

(y) Blackburn on Sale 17.

(s) See his decision in *Parker v. Staniland*, 11 East 365.

(a) 1 Q. B. D. 700.

12. *Brown v. Morris*, 83 N. C. 251, 254. Here the owner of land from which brick

was made reserved title till his clay was paid for. Smith, C. J., said: "The statute of frauds has no application to a contract concerning personalty, which the brick became, and which, but leaves title where it was, in the owner of the soil."

class of products of the soil, not annual, as emblements, not permanent, as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, &c. The only reported case on this subject is *Graves v. Weld*, (b) ^{*Graves v. Weld.*} which was argued by very able counsel, and decided, after consideration, by Lord Denman, who delivered the unanimous judgment of the court, consisting of himself and Littledale, Parke and Patteson, JJ. The facts were that the plaintiff was possessed of a close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th of July, 1830, the reversion being then in defendant. In January, 1831, plaintiff delivered up the close to the defendant, but in the meantime had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June *of the following year*. The clover in question was cut by defendant about the end of May, 1831, more than a twelve-month after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st.—That the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2d.—That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not in the long run and on the average, repay himself in the autumn for the extra cost he had incurred in the spring.

The case was argued by Follett for plaintiff, and Gambier for defendant, and Lord Denman, in delivering the judgment of the whole court, said: "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be

(b) 5 B. & Ad. 105.

encouraged to cultivate by being sure of the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the ceaser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law."*

Again, "the principal authorities upon which the law of emblements depends are Littleton, § 68, and Coke's Commentary on that passage. The former is as follows: 'If the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord Coke says (Co. Litt. 55 a): 'The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax or any other *annuall* profit, if *after the same be planted*, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have *that yeare's crop*. But if he plant young fruit trees or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield *no present annuall profit*.' These authorities are strongly in favor of the rule contended for by defendant's counsel; they confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight

an exception, really falls within this rule. In *Latham v. Attwood*, (c) they were held to be *like* emblements, because they were 'such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:' that labor and expense, without which they would not grow at all, seemed to have been deemed equivalent to the sowing and planting of other vegetables."

§ 131. According to the principles here established, it would *seem* that the crop of the first year in such cases would be *fructus industriales*, but that of subsequent years, like fruit on trees planted by tenants, would be *fructus naturales*, unless requiring cultivation, labor, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted.¹³ But the law as to the application of the statute of frauds to sales of growing crops of this character, especially of crops subsequent to the first gathered, cannot be considered as settled.

§ 132. A singular case of the sale of crop not yet sown was determined in *Watts v. Friend*. (d)¹⁴ The bargain was, that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the seventeenth section of the statute of frauds. The amount of the seed produced turned out to be two hundred and forty bushels, and as the agreement was that the crop should be severed before the property was transferred, it was clearly not a sale of an interest in land; but the reporter, in a note to the case, calls attention to a point not discussed in it, viz., that when the bargain was made, it was *uncertain* whether the value of the seed

Crop not yet sown.

Watts v. Friend.

(c) 1 Cro. Car. 515.

13. In *Purner v. Piercy*, 40 Md. 212, 223, a sale of peaches unripe on the trees for a lump sum, to be gathered by the purchaser as ripened, was held not within the fourth section. Stewart, J., cites Benjamin on Sales and quotes Taylor's Law of Evidence to this effect: "Third. An agreement respecting the sale of a growing crop of fruit or grass, or of standing underwood, growing poles or timber, is within the fourth section, and a written contract of sale cannot be dispensed with."

"This," says Stewart, J., "we think, as to be taken with some qualification, and that a growing crop of peaches or other fruit requiring periodical expense, industry and attention, in its yield and production, may be well classed as *fructus industriales*, and not subject to the fourth section of the statute."

(d) 10 B. & C. 446.

14. Cited and followed in the similar cases of *Brown v. Sanborn*, 21 Minn. 402, and *Bowman v. Conn*, 8 Ind. 58, (stated note 7, *supra*.)

to be produced would reach £10, and that under the fourth section it has been held, that cases depending on contingencies which may or may not happen within the year, are not within that section, though the event does not in fact happen within the year.

§ 133. In the *Earl of Falmouth v. Thomas*, (e) where a farm was leased, and the tenant agreed to take the growing crops and the labor and materials expended, according to a valuation, it was held that the whole was a contract for an interest in land under the fourth section, and that plaintiff could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation. Littledale, J., expressed the same opinion in *Mayfield v. Wadsley*, (f) saying that "where the land is agreed to be sold, the vendee takes from the vendor the growing crops, the latter are considered part of the land." This rule seems founded on sound principles, for in such cases the fact of his having acquired an interest in the land is part of the consideration which moves the purchaser to buy the crops; or as it is put in *Blackburn on Sale*, (g) the purchaser pays for an abandonment by the lessor or vendor of the right to injure the freehold. He buys an interest "*concerning* land," and that is covered by the language of the fourth section.

In the early case of *Waddington v. Bristow*, (h) in 1801, an agreement for the purchase of growing hops at £10 per cwt., to be put in pockets and delivered by seller, was held to require a stamp, and not to come within the exemption of agreements for the sale of goods, wares, and merchandise. The case is quite irreconcilable with the principles settled in the more modern decisions, and in *Rodwell v. Phillips*, (i) Parke, B., said of it: "Hops are *fructus industriales*. That case would now probably be decided differently." It may therefore be considered as overruled. 15

(e) 1 *Crom. & M.* 89.

(f) 3 *B. & C.* 366.

(g) *Page* 20.

(h) 2 *Bos. & P.* 452.

(i) 9 *M. & W.* 508.

15. But see *Purner v. Piercy*, 40 *Md.* 212, quoted in note 13, *supra*, where peaches are held *fructus industriales*, because requiring annual cultivation.

CHAPTER III.

WHAT IS A CONTRACT FOR THE PRICE, OR OF THE VALUE OF £10.

	SEC.		SEC.
Several articles sold on one occasion.....	134	Uncertain value.....	136
Auction sales of several lots.....	135	Different contracts for a single consideration.....	137

§ 134. In several cases, questions have been raised as to the construction of the words, "for the price of £10 and upwards," and "of the value of ten pounds and upwards," as used in the seventeenth section of the statute of frauds, and in Lord Tenterden's act.

In *Baldey v. Parker*, (a) the plaintiffs were linen-drappers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of £10. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to £70, and he demanded a discount of £20 per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. Held, that this was one entire contract within the seventeenth section. All the judges, Abbott, C. J., Bayley, Holroyd, and Best, JJ., gave separate opinions. Abbott, C. J., said, "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley, J., said, "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than £10. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than £10 within the seventeenth section; and I think that the circumstances of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said, "This was all one transaction, though

Several articles
sold at same
time.

*Baldey v.
Parker.*

(a) 2 B. & C. 37. See *Price v. Lee*, 1 B. & C. 156

composed of different parts. At first it appears to have been a contract for goods of less value than £10, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the statute of frauds, *it being the intention of that statute, that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of £10*, it should not bind, unless the requisites there mentioned were complied with. 'The danger of false testimony is quite as great where the bargain is ultimately of the value of £10, as if it had been originally of that amount.'

Best, J., said, "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."¹

§ 135. But where at an auction, the same person buys several successive lots as they are offered, a distinct contract arises Auction sales of several lots. for each lot, and the decision to this effect in *Emmerson v. Heelis* (b) was not questioned in *Baldey v. Parker*.²

1. This case of *Baldey v. Parker* was cited and followed in *Allard v. Greasert*, 61 N. Y. 1, 4. See *Brown v. Hall*, 5 Lans. 177. But in *Aldrich v. Pyatt*, 64 Barb. 391, a farmer sold at one time his barley for \$1 per bushel, and apples for \$2.50 per barrel, the apples to be delivered immediately, and the barley at a later time, payment to be made when delivered. The apples were delivered and paid for, but the buyer refusing to accept the barley, suit was brought for damages. It appeared that the barley amounted to over fifty bushels. The sale of barley was held separate and within the statute, Judge Smith quoting *Mills v. Hunt*, 20 Wend. 434, stated in note 2, *infra*. See *Gilman v. Hill*, 36 N. H. 311, 318; *Gault v. Brown*, 48 Id. 183.

(b) 2 Taunt. 38. Also per *Le Blanc, J.*, in *Rugg v. Minett*, 11 East 218; *Roots v. Lord Dormer*, 4 B. & Ad. 77, and per the law lords in *Couston v. Chapman*, L. R., 2 H. L. Sc. 250.

2. In *Mills v. Hunt*, 20 Wend. 431, a

bidder at auction bought five parcels, which were billed to him, the whole amounting to over \$200. By the terms of sale approved notes were to be taken for sums over \$100. Four parcels only were delivered to the buyer, who brought suit for the value of the fifth. Chancellor Walworth gave the opinion of the Court of Errors, saying that the bill of parcels "is to be regarded as evidence that the several articles purchased by Hunt at the same auction sale, although in different bids and upon different catalogues, were considered by the vendors as embracing one contract, and upon which the vendee was entitled to credit for six months. He was in the situation of a purchaser who goes to a store and buys different articles at separate prices for each article upon approved paper for the aggregate amount of such sales; in which case there can be no doubt that a delivery of part of the articles so purchased, without any objection at the time to the delivery of the residue, is sufficient to take the case

• § 136. Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of £10 according to the terms of the contract, yet, if in the result it turn out that the value actually exceeds £10, the statute applies.³ This point was involved in the decision in *Watts v. Friend*, (c) where the sale was of a future crop of turnip-seed which might or might not amount to £10, the price stipulated being a guinea a bushel. But the point was not argued nor mentioned by counsel or by the court.

Uncertain
value.

§ 137. Where a contract includes a sale of goods, and other matters not within the statute, if the goods included in the contract be of the value of £10, the seventeenth section of the statute will apply.⁴ In *Harman v. Reeve*, (d) the plaintiff had sold a mare and foal to defendant, with the

Different contracts for one consideration.

Harman v. Reeve.

out of the statute as to the whole goods purchased." "The case would be different where the purchaser, either at a public or private sale, paid for and took a delivery of some of the separate articles only, leaving the residue undelivered and wholly unpaid for; or where several articles were purchased at the same time, to be paid for on delivery, and the purchaser afterwards received and paid for some of the separate articles only." *Baldey v. Parker* is cited, and a recovery sustained. *Mills v. Hunt* was followed in Pennsylvania in *Coffman v. Hampton*, 2 W. & S. 377, and in *Tompkins v. Haas*, 2 Penna. St. 74. And in *Kerr v. Shrader*, 1 W. N. C. 33, a horse and mare were sold at auction on separate bids to the same purchaser, and it was held that the vendor need not deliver one without an acceptance of the other. But in *Barclay v. Tracy*, 5 W. & S. 45, where several purchases were made at auction on different terms, each is deemed a distinct contract. In *Jenness v. Wendell*, 51 N. H. 63, defendant bought at an auction of hotel furniture a number of articles, none for more than \$15, all amounting to about \$200. It was held an entire contract on the authority of *Mills v. Hunt*, but the

point was not involved in the decision. On sales of land in lots each sale is separate. *Jenness v. Wendell*, 51 N. H. 63; *Wells v. Day*, 124 Mass. 38.

3. *Brown v. Sanborn*, 21 Minn. 402; *Bowman v. Conn*, 8 Ind. 58; *Carpenter v. Galloway*, 78 Ind. 418. In this case the court cites *Brown* on Statute of Frauds, § 312, to the effect that the parties seeking to enforce a contract uncertain as to price should show that the price did not exceed the amount named in the statute. *Buskirk v. Cleveland*, 41 Barb. 610.

(c) 10 B. & C. 446.

4. *Lamb v. Crafts*, 12 Metc. 353; *Irvine v. Stone*, 6 Cush. 508. In this case plaintiff sued for the price of coal shipped by him from Philadelphia to Boston on a parol order from defendant, and sued also for the expense of transportation, which, by the same oral order, defendant had agreed to pay. *Metcalf, J.*, said: "The position taken for the plaintiff is that an agreement which is void in part by the statute of frauds is not necessarily void *in toto*; but that another part thereof, which would be valid if it stood alone, may be held valid if it can be separated from the part which is void. And this position is not

(d) 25 L. J., C. P. 257; 18 C. B. 586.

obligation to agist them at his own expense till Michaelmas, and also to agist another mare and foal belonging to defendant, the whole for £30. Averment of full performance by plaintiff, and breach by defendant. It was admitted that the mare and foal agreed to be sold were above the value of £10. Held, that the contract for the sale was within the seventeenth section of the statute. *Semble*, however, that although the contract was entire, and the price indivisible, plaintiff might have recovered the value of the agistment of defendant's mare and foal. Per *Jervis, C. J.*, and *Williams, J.* (e)

only correct in principle and conformable to the analogies of the law, but is also sustained by authority. The remaining question is whether the good part of the contract before us can be separated from the bad, so that the plaintiff can enforce the part which is good on his general counts. And we are of opinion that, from the nature of the contract, this cannot be done. It is, in its nature, entire. The transporting of the coal apart from the sale of it, was of no benefit to the defendants, and could not have been contemplated by either party as a thing to be paid for, or to be done, except in connection with the sale. The good part of the contract cannot practically be severed from the bad and separately enforced."

Cites *Lea v. Barber*, 2 Anst. 425, note. See *Read v. Mather*, 11 Cush. 1, 7; *Noyes v. Humphreys*, 11 Gratt. 636; *Thayer v. Rock*, 13 Wend. 53. This was on an oral contract for sale of real and personal property, and, being void as to the realty, was held wholly void. Cited and followed in *Harsha v. Reid*, 45 N. Y. 420, and in *De Beerski v. Paige*, 36 N. Y. 537; *Dock v. Hart*, 7 W. & S. 172; *Fuller v. Reed*, 38 Cal. 99; *Haynes v. Nice* 100 Mass. 327; *Warren v. Chapman*, 105 Mass. 87.

(e) See, also, *Wood v. Benson*, 2 Cr. & J. 95; and *Astey v. Emery*, 4 M. & S. 263; *Cobbold v. Caston*, 1 Bing. 399; 8 Moo. 456

CHAPTER IV.

OF ACCEPTANCE AND RECEIPT.

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OF THE CONSTRUCTION OF THE WORDS "EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME."

§ 138. Having considered the meaning of the words "no contract for the sale of any goods, wares, or merchandise for the price of £10 or upwards," so as to ascertain what contracts are within the seventeenth section, the next step in the investigation is to inquire into the several conditions required by the law before such contracts "shall be allowed to be good." The language is that they shall not be allowed to be good "except—

1. "The buyer shall accept part of the goods so sold, and actually receive the same."
2. "Or give something in earnest to bind the bargain, or in part payment."
3. "Or that some note or memorandum in writing of the said bar-

gain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

The first of these exceptions is the subject of the present chapter.

SECTION 1.—WHAT IS AN ACCEPTANCE.

§ 139. In commenting on this clause, Lord Blackburn makes the following remarks:—(a)

"If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts."¹

(a) Blackburn on Sale 22, 23.

1. Some Act of the Buyer is Essential to Acceptance. Mere Words are not Enough.—The reports of the Massachusetts Supreme Court, and of the New York Court of Appeals, are particularly full on the subject discussed in this chapter, and the decisions are, in the main, harmonious with each other, and with the English decisions, as stated in the text. An often cited case is that of *Shindler v. Houston*, 1 N. Y. 261. This was a sale of lumber Defendant exam-

ined the lumber piled on a public dock, and made an offer for it. Plaintiff said: "The lumber is yours." Defendant then told plaintiff to get the inspector's bill and carry it to the agent of defendant, who would pay for it. The next day payment was refused, and suit was brought and was sustained in the Supreme Court on the ground that there had been such delivery and acceptance as was practicable of ponderous articles. But the Court of Appeals reversed the Supreme Court. Gardiner, J., said:

§ 140. "The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of

"Mere words are not sufficient." Bronson, J., said: "There was nothing but mere words, and the statute plainly requires something more; it calls for *acts*. Per Cowen, J., in *Archer v. Zeh*, 5 Hill 205, 'Mere words of contract, unaccompanied by any act, cannot amount to a delivery. To hold otherwise would be repealing the statute.'" This case was followed in *Kirby v. Johnson*, 22 Mo. 354, 361, Ryland, J., quoting the words of Wright, J., as follows: "This delivery and acceptance can only be evinced by unequivocal acts, independent of the proof of the contract." See *Harvey v. St. Louis Butchers', &c., Assoc.*, 39 Mo. 211. In *Caulkins v. Hellman*, 47 N. Y. 449, 452, wine was sold by parol, and sent by rail to the buyer, who, being dissatisfied with it, refused to accept. Rapallo, J., said: "The receipt of the goods without acceptance is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract." In *Stone v. Browning*, 68 N. Y. 601, the language of Blackburn, in the text, is quoted and approved. Rapallo, J., said: "It perhaps was not the intention of the plaintiffs that the defendants should have the option of rejecting the goods, unless some just reason for so doing should be developed upon the examination; but, nevertheless, so long as the plaintiffs reposed upon a verbal contract, void under the statute, they exposed themselves even to an unjust refusal to accept. The injustice of the refusal, if it were unjust, could not supply the place of an acceptance or of a written contract." See *Stone v. Browning*, 51 N. Y. 211; *Brewster v. Taylor*, 63 N. Y. 587. In *Shepherd v. Pressey*, 32 N. H. 57, it was claimed that

oral agreements by the buyer subsequent to the sale, showed an acceptance by him. Bell, J., said: "There is in this case no direct evidence of any act of the defendant, from which an acceptance and actual receipt of the articles agreed for can be inferred, and the only evidence to be considered is his declarations. As mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words afterwards used, looking to the future, to acts afterwards to be done by the purchaser towards carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." This language is quoted and approved in *Cooke v. Millard*, 65 N. Y. 352, 373. In *Dole v. Stimpson*, 21 Pick. 384, an engine on the premises of the vendor was sold, the seller saying, "You consider the engine yours," and the buyer assenting—*Held*, within the statute. In *Knight v. Mann*, 118 Mass. 143, the seller of a lot of calf skins prepared them for delivery, the buyer calling and ratifying orally what was done. Before removal by the buyer they were destroyed by fire. On suit for the price, Endicott, J., said: "When the seller has done all that is required of him by the oral agreement, it is for the buyer to determine whether he will accept. He may refuse or neglect to do so; he may do this unreasonably, assigning insufficient reasons, or giving no reasons at all; the question is not why he did not, or whether he ought to accept, but whether he did accept." Cites Benjamin on Sales, above section. See same case, 120 Mass. 219. *Safford v. McDonough*, 120 Mass. 290, follows *Knight v. Mann*, and also holds that there is no acceptance and receipt while the vendor retains a lien for the price. *Rodgers v. Jones*, 129 Mass. 420, was like *Knight v. Mann*, a sale of calf skins, destroyed by

the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods." 2

fire before they left the premises of vendor, and it was held that there was no acceptance and receipt. See *Phillips v. Hunnewell*, 4 Me. 376; *Doley v. Marks*, Berton (N. B.) 346; *Dollard v. Potts*, 6 Allen (N. B.) 443; *Carman v. Smick*, 15 N. J. L. 352; *Kellogg v. Witherhead*, 6 N. Y. Sup. Ct. (T. & C.) 525; *Brabin v. Hyde*, 32 N. Y. 519; *Hallenbeck v. Francis*, 20 Hun 416; *Young v. Blaisdell*, 60 Me. 272. *Shindler v. Houston* and *Benjamin on Sales* are quoted and followed in *Bowers v. Anderson*, 49 Ga. 143; *Gorham v. Fisher*, 30 Vt. 428. In *Scotten v. Sutter*, 37 Mich. 527, an oral sale of cigars of a certain class to be manufactured was made for \$500, no specific goods being set apart, and some were sent to the buyer's store. The buyer said he would take them as soon as he could, that he was taking stock and had no time then, but as soon as he should need them he would send for them. Thereupon, they were taken back to the seller's store. Subsequently, the buyer sent for and received certain cigars of the same class included in the oral purchase, but without recognizing that purchase, and finally he refused to accept the whole. *Cooley, C. J.*, said: "It is to be observed of this evidence (as to the part first sent) that it

does not indicate an understanding that the goods were then accepted and taken, and merely left in plaintiff's hands for convenience, but rather a promise to send for them as the defendant should need them. Now if the first promise was invalid because not in writing, the second promise, which was also not in writing, could be no better; it would be invalid on the same grounds precisely as the first." It is not very clear why the court did not recognize the subsequent deliveries as acceptance and receipt of part. See § 167, *infra*, and notes thereto. Perhaps the explanation is that the court did not find any evidence in the case that the subsequent acceptance of small lots was with reference to the oral contract.

2. The Acceptance must be Pursuant to the Contract of Sale, and with Intent to Take Possession as Owner.—*Shepherd v. Pressey*, 32 N. H. 49, 55; *Cunningham v. Ashbrook*, 20 Mo. 553; *Kirby v. Johnson*, 22 Mo. 354, 361; *Rickey v. Tenbroeck*, 63 Mo. 563; *Davis v. Eastman*, 1 Allen 422. In *Atherton v. Newhall*, 123 Mass. 141, an oral sale of leather was made in Boston to a customer living in Lynn. A small part of it was taken by an expressman accustomed to transport the buyer's purchases, but with-

And this is also the law in the United States—Caulkins v. Hellman, 47 N. Y. 449.

American law
the same.

out any request in this instance, but before it reached the buyer the remainder was destroyed in the great Boston fire. Immediately on receipt of the lot delivered by the carrier, the buyer notified the vendor that he would pay only for the part received. Gray, C. J., said: "The acceptance by the buyer of the part brought by the expressman was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract, and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received." *Rodgers v. Jones*, 129 Mass. 420. In *Townsend v. Hargraves*, 118 Mass. 333, Colt, J., said: "The acceptance which the statute requires to give validity to the contract must be with intention to perform the whole contract, and assert the buyer's ownership under it, but it is sufficient if it be of part of the goods only." And in that case the court held such partial acceptance to bind the purchaser to pay for the whole, although the rest of the goods not accepted had been destroyed before the acceptance took place. This was on the theory that the statute affects the remedy only, and that the oral contract is valid from its date, although the acceptance is subsequent. See § 91, note. *Van Woert v. Albany and Susquehanna R. R.*, 67 N. Y. 538, was an oral sale of one thousand cords of wood, of which part was delivered and paid for. Defendant refusing to receive the residue, suit was brought for breach. It was held that it was properly left to the jury to determine whether the deliveries were made upon the contract. *Garfield v. Paris*, 96 U. S. 557, 566; *McKnight v. Dunlop*, 5 N. Y. 537; *Safford*

v. McDonough, 120 Mass. 290; *Remick v. Sanford*, 120 Mass. 309; *Stone v. Browning*, 68 N. Y. 598; *Caulkins v. Hellman*, 47 N. Y. 449; *Marsh v. Rouse*, 44 N. Y. 643. In *Shindler v. Houston*, 1 N. Y. 261, the facts of which are stated in the last note, *Gardiner, J.*, said: "I am aware that there are cases in which it has been adjudged that where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited, furnishes an example of this kind. But to aid the plaintiff an authority must be shown that a stipulation in the contract of sale for the delivery of the key, or other indicia of possession, will constitute a delivery and acceptance within the statute." And the court approves *Phillips v. Bistolli*, stated by our author in § 142. In Wisconsin the law on this subject is stated in *Bacon v. Eccles*, 43 Wis. 227. The court was somewhat hampered by the previous decision of *Smith v. Stoller*, 26 Wis. 671, in which it was held that "where tea valued at more than \$50 was sold by sample and a chest of it delivered to the buyer as in pursuance of the contract, which, after opening it, he undertook to return, it was not error to instruct the jury in substance that if he received the tea with intent to accept it in case it should agree with the sample, and if they found that it did in fact agree with the sample, then there was a complete acceptance, and he was liable for the price." In *Bacon v. Eccles*, *Lyon, J.*, said that *Smith v. Stoller* is "an advance," and that the court could go no farther without disregarding the language and purpose of the statute. "In this case it is manifest that plaintiffs received the sugar for the express purpose of seeing whether

§ 141. The decisions upon the question what constitutes an acceptance have been numerous. In a leading case, *Hinde v. Whitehouse*, (b) where sugar had been sold by auction, the defendant, as highest bidder, had received the sample of sugar knocked down to him, and it was proved that at such sales the samples were always delivered to the purchasers as part of their purchase to make up the quantity. This was held to be an

Acceptance of
sample as part.

Hinde v.
Whitehouse.

they would accept or not, that they refused to accept, and that they did no act in respect to the sugar, inconsistent with the continued ownership of the defendants. And the plaintiffs having refused sugar delivered to them on an oral sale, brought suit for breach of contract to sell, but were held, by their own refusal to accept, to have prevented the contract from coming in force. In the New Jersey Court of Errors, (*Matthiessen, &c., Co. v. McMahon*, 38 N. J. L. 538,) Depue, J., said: "The judge charged the jury that a delivery, to validate a contract within the statute of frauds, must be a delivery under the contract and in pursuance of it. This instruction was correct. Delivery and acceptance of the goods sold, or some part of them, or part payment of the contract price, whether at the time of making the contract or subsequently, are the acts of part performance which are prescribed by the statute as necessary to the validity of a contract of which no written evidence has been provided. To have this effect, the delivery and acceptance or payment must obviously be referable to and be in part execution of the contract, which is thereby to be made valid." See *Danforth v. Walker*, 40 Vt. 257; *Gibbs v. Benjamin*, 45 Vt. 124; *Rider v. Kelley*, 32 Vt. 268; *Brand v. Focht*, 3 Keyes 409; *Gilman v. Hill*, 36 N. H. 311. In Maine, *Shindler v. Houston* was cited and followed in *Maxwell v. Brown*, 39 Me. 98, and in *Edwards v. Grand Trunk Railway Co.*, 48 Me. 379; same case, 54 Me. 105; *Young v. Blaisdell*, 60 Me. 272. In Maryland, the law is the same. *Belt v. Marriott*, 9

Gill 381; *Jones v. Mechanics' Bank*, 29 Md. 287, 293; *Hewes v. Jordan*, 39 Md. 472.

Both Seller and Buyer must Acquiesce in Acceptance.—An interesting case illustrating the principle that both seller and buyer must acquiesce in acceptance to constitute a valid contract, is that of *Washington Ice Co. v. Webster*, 62 Me. 341. An oral sale of four thousand tons of ice was made, but the seller, whose oral offer was accepted by telegraph, sent a written memorandum, signed by himself, slightly varying the previous terms, for signature by the buyer, and before it was signed sold his ice to another purchaser. The buyer replevied the ice. *Appleton, C. J.*, said: "It is urged that the plaintiffs have accepted and received the ice. To constitute an acceptance there must, first, be a delivery by the seller with intent to give possession of the goods to the purchaser. Here no act on the part of the defendant is shown indicating such intention in the slightest degree. The taking possession of the ice without or against his consent is not a receipt or acceptance binding him. The forcible seizure of property sold, when the sale is void by the statute of frauds, cannot be deemed an acceptance or receipt, within its provisions. If it were so it would be to affirm judicially the rule that might makes right. Nor does the seizure of the ice by this writ of replevin, and a delivery of the same by an officer to the plaintiffs, constitute a statutory receipt, and an acceptance by the purchaser."

(b) 7 East 558.

acceptance of part of the goods sold, Lord Ellenborough saying, "Inasmuch as the half-pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a *part of the bulk actually weighed out to the buyer*; and to be allowed for specifically if he should chuse to have the commodity weighed; I cannot but consider it as a *part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer*. And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, *as soon as in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly.*"³

§ 142. In *Phillips v. Bistolli*, (c) where a purchaser of some jewelry at an auction sale held it in his hands a few minutes and tendered it back to the auctioneer, saying there had been ^{*Phillips v. Bistolli.*} a mistake, the court set aside a verdict for plaintiff, and ordered a new trial, saying, "to satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, *with an intention of taking to the possession as owner.*"

3. **Acceptance of Samples.**—Ordinarily, taking samples cannot be considered as an acceptance to satisfy the statute of frauds. "If a symbolical delivery is relied on, it must appear to be a delivery by the vendor and an acceptance by the vendee, with a view to change the possession." *Carver v. Lane*, 4 E. D. Smith 168, 170. "Where samples are treated by the parties as specimens only of the goods sold, a delivery of them to the buyer does not satisfy the statute." *Chalmers, J.*, in *Moore v. Love*, 57 Miss. 765, 767, citing *Benjamin on Sales, supra*. And he says that the burden of showing that samples are accepted as part of goods sold is upon him who asserts it. If the goods accepted are a substantial part of those sold, and are to be paid for as such, the acceptance will suffice. Whether they

are such in a case of any doubt, must be left to the jury. *Garfield v. Paris*, 96 U. S. 557, 565. In this case suit was brought for liquors bought in New York and sent to the buyers in Michigan. The defence was that the acceptance took place, and therefore the contract was made in Michigan, and such sales were void under the liquor laws of that state. The plaintiffs relied on the fact that by the contract of sale their copyrighted labels were to be furnished with the liquor, and were received and accepted by defendant in New York, and the court held, on the authority of *Hinde v. Whitehouse*, cited in the text, that the question was properly submitted to the jury.

(c) 2 B. & C. 511. See, also, *Klinits v. Surrey*, 5 Esp. 267.

§ 143. In *Gardner v. Grout*, (d) *after* the sale agreed on, the buyer went to the vendor's warehouse and got samples of the goods sold, which he promised to pay for when he took away the bulk; and the samples so taken were weighed and entered against him in the vendor's book. The vendor then refused to complete the sale, but held that there had been a part acceptance making the bargain complete.

In this case the defendant cited *Simonds v. Fisher*, not reported, in which Wightman, J., had nonsuited the plaintiff, the facts being that plaintiff showed defendant samples of wine which the latter agreed to buy, and after the bargain was concluded, the buyer asked for the samples and wrote on the labels the prices agreed on; and this taking of the samples was relied on as a part acceptance, so as to take the case out of the statute. But the court, in deciding *Gardner v. Grout*, distinguished it from *Simonds v. Fisher*, saying, "There the buyer never saw the bulk: the things handed to him really were mere samples. (e) But here the plaintiff receives part of the very things which he has already bought."

So in *Foster v. Frampton*, (f) the drawing of samples by a vendee from hogsheads of sugar forwarded to him by the vendor, when the sugar was in the carrier's warehouse at the place of destination, was held to be a taking possession of part of the goods, "a complete act of ownership" (per Littledale, J.,) putting an end to the vendor's right of stoppage *in transitu*.

In *Gilliat v. Roberts*, (g) the defendant having purchased one hundred quarters of wheat, sent his servant for three sacks of it, which were delivered, but the contract was for wheat "not to weigh less than nine and a half stone neat imperial measure, to be made up eighteen stone neat," and the sacks sent had not been tested according to imperial measure, nor had the wheat received the usual final dressing before delivery. On these facts, the defendant, who had not returned the three sacks, maintained that he had kept them under a new implied contract to pay for their value, and not as part of the one hundred bushels bought, with which the three sacks did not correspond in description. But held that there

(d) 2 C. B. (N. S.) 340. See, also, 14, where the sample was not part of the bulk. *Klinitz v. Surrey*, 5 Esp. 267; *Talver v. West*, Holt 178.

(f) 6 B. & C. 107.

(e) See, also, *Cooper v. Elston*, 7 T. R.

(g) 19 L. J., Ex. 410.

was but one contract, and that the buyer had actually received and accepted part of the goods sold, so as to take the case out of the statute.

§ 144. It is quite well settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the court." (h) ^{Acceptance may be constructive.} The acceptance must be clear and unequivocal, but "it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance." (i) ^{Question of fact, not of law.} All the cases proceed on this principle.⁴

(h) Per Denman, C. J., in *Eden v. Duffield*, 1 Q. B. 302.

(i) Per Coleridge, J., in *Bushel v. Wheeler*, 15 Q. B. 442, quoted and approved by Campbell, C. J., in *Morton v. Tibbett*, 15 Q. B. 428, and 19 L. J., Q. B. 382. See, also, *Parker v. Wallis*, 5 E. & B. 21.

4. Constructive Acceptance.—*Brown v. Wade*, 42 Iowa 647, is a case of constructive acceptance by mere words, held sufficient as an oral sale of cattle. Day, J., said: "The evidence shows that the cattle were running out on the range. All that was necessary to complete the sale was that the right of dominion over them should be transferred from Brown to Davis. To this end it could not be necessary that Davis should take them into his manual custody, and drive them off the range, or remove them to another part of it. The interest and the convenience of the purchaser required that the cattle should remain where they were, and he had a right to leave them there. It was only necessary that the cattle should be pointed out, that Brown should agree that Davis might have them in part pay for the land, and that Davis should agree to take them as such payment where they were and as they were, and then the delivery was complete." This case does not accord with those set

forth in note 1, *supra*. See, also, *Shindler v. Houston*, quoted in note 2. If the case is one where no acceptance is practicable, the remedy is easy—make part payment or write and sign the contract. In *King v. Jarman*, 35 Ark. 190, an oral sale was made by sample of cotton in a warehouse, and the seller gave the buyer a written order on the warehouseman. The buyer sent an agent with the order to the warehouse to have the "ticket changed," but, owing to the lateness of the hour, was told to wait till morning, and did not produce the order. During the night the cotton was burned. The warehouseman testified that he considered the cotton to be the buyer's, having received notice from both parties. The court held that there was an acceptance. "Having the intention to accept, did he actually receive? The statute has never been in this state, nor in England, construed to abolish the doctrine of symbolical delivery. With regard to bulky articles, or those not immediately accessible, symbolical delivery, by something which may be proved in *pais* of a satisfactory nature, satisfies the reason and policy of the statute. In *Gray v. Davis*, 10 N. Y. 285, an oral sale was made of a stock of goods, of which the parties proceeded to make an inventory, on completing which, the buyer told the seller's clerk to take

The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as owner, when he does an act which he would have authority to do as owner, but not otherwise. In the language of an eminent judge, (*k*) "if the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right, if he is owner of the goods, the doing of that act is evidence that he has accepted them."⁵

When buyer
does an act of
ownership

the keys for him from the vendor till the next morning. On the next morning the buyer repudiated the transaction. Suit was brought for not accepting. Gardiner, J., said: "I think the question of delivery should have been submitted to the jury. The plaintiff's clerk testifies that after the inventory of stock was taken, and it had been arranged that plaintiff should copy the bill of goods and hand it to defendant in the morning, he 'told the witness to give the keys of the store to the defendant; Davis said he did not want to take them until morning; that his rent did not commence until then, and he had no insurance; Gray replied, 'I will give you my policies of insurance on the stock;'" Davis then told me to take the keys for him until morning, and I took them, and we all left together.'" There is no doubt that Gray intended to give possession of the goods, and whether the defendant designed to accept them, by the direction above mentioned, to Kenworthy to take the keys for him until morning, was a question for the jury." In *Calkins v. Lockwood*, 17 Conn. 154, 174, iron was sold by an oral contract, the seller saying: "I deliver this iron to you at that price." The iron being afterwards seized by the seller's creditor, the court held the sale valid, the delivery being all that the ponderous nature of the article sold made practicable. See *Benford v. Schell*, 55 Penna. 393; *Atwell v. Miller*, 6 Md. 10; *Carter v. Willard*, 19 Pick. 1, 9.

Acceptance by one of two or more Joint Purchasers Binds All.—*Vincent*

v. Germond, 11 Johns. 283; *Field v. Runk*, 22 N. J. L. 525; *Smith v. Milliken*, 7 Lans. 336. But see *Chamberlin v. Dow*, 10 Mich. 319, where it is held that a verbal contract by two jointly, within the statute, cannot be made effectual to bind both by a subsequent ratification by one only, having no authority from the other outside of the verbal contract. *Approved*, *Grimes v. Van Vechten*, 20 Mich. 410.

(*k*) *Erle, J.*, in *Parker v. Wallis*, 5 E. & B. 21.

5. Acts of Ownership.—*Garfield v. Paris*, 96 U. S. 557; *Pinkham v. Mattox*, 53 N. H. 600; *Stone v. Browning*, 68 N. Y. 600; *Dollard v. Potts*, 6 Allen (N. B.) 443; *Bacon v. Eccles*, 43 Wis. 238. In *Vincent v. Germond*, 11 Johns. 283, cattle were sold to two purchasers by an oral sale, and left in the possession of vendor, to be called for. One of the buyers afterwards came and took them without communication with vendor. *Held*, an act of ownership which validated the contract as to both buyers. In *Barkalow v. Pfeiffer*, 38 Ind. 214, gravestones were ordered, and when finished the buyer approved them, and ordered the seller to set them up in a cemetery. After they had been set up he became dissatisfied and refused to pay the price. The court held that his approval expressed before and after the stones were set up was sufficient evidence of acceptance. *Walker v. Boulton*, 3 U. C. Q. B. (O. S.) 252, was a case where the buyer selected plate and directed his crest engraved on it, and that it should then be forwarded to his house,

Thus, in *Chaplin v. Rogers*, (l) where the purchaser of a stack of hay resold part of it, and in *Blenkinsop v. Clayton*, (m) where the purchaser of a horse took a third person to the vendor's stable, and offered to resell the horse to the third person at a profit, the buyer was held in both instances to

*Chaplin v.
Rogers.*

*Blenkinsop v.
Clayton.*

which was done. *Held*, a sufficient acceptance and receipt to satisfy the statute. In *re Safford & Downing*, 2 Lowell 563, a buyer of leather left it on the premises of the vendor marked with the buyer's name, to be delivered when sent for by him. The goods were destroyed by fire. It was held that the buyer had lost his lien, the goods being sold on sixty days' credit, that there was acceptance when they were selected and marked, and that they were delivered by putting them apart for the buyer, the seller thenceforth holding as bailee. Some stress was laid on the fact that the buyer wished the vendor to protect the goods by insurance. An acceptance of part coupled with a declaration at the time that the buyer will be responsible only for the part received, is not an acceptance which will take the whole contract out of the statute. *Atherton v. Newhall*, 123 Mass. 141. In *Townsend v. Hargraves*, 118 Mass. 332, Colt, J., said that there was evidence that the warehouseman, in whose hands the goods sold were, after being notified of the sale, undertook at the buyer's request to deal with it for him. "Such an arrangement the jury may have found constituted a sufficient acceptance and receipt." The act of ownership must be clear and unequivocal. In *Delventhal v. Jones*, 58 Mo. 460, the buyer furnished sacks for oats bought, and they were filled with oats and delivered at a place agreed upon, but the buyer refused to receive them. It was held that there could be no recovery under the contract, the court saying that they would not "sanction such a latitudinous construction as would give rise to all the evils that the statute was enacted to prevent."

Acceptance implied by Resale.—If the buyer resells all or part of the goods, this is such an unmistakable act of ownership that it has often been held an acceptance. *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Marshall v. Ferguson*, 23 Cal. 65, 69; *Hill v. McDonald*, 17 Wis. 97, 101. In this case *Paine, J.*, said: "The defendants had the right to have the shingles inspected by their inspector before they were obliged to accept them. But they might waive this right, and by selling them to other parties they did waive it and accepted them beyond any possibility of refusal." But a sale or offer for sale by the buyer of goods which he has not yet examined, will not amount to an acceptance, if, on examination, he rejects the goods. *Jones v. Mechanics' Bank*, 29 Md. 287, 297. And in *Clarkson v. Noble*, 2 U. C. Q. B. 361, which was a suit for the price of iron sold, *Robinson, C. J.*, said: "There was nothing proved here at all equivalent to what was proved in the case cited of *Chaplin v. Rogers*, for there the vendee had actually sold again part of the hay purchased by him, and his vendee had taken some of it away. Here, this defendant had done nothing more than offer to sell to a third party some of the iron which had been knocked down to him; but the mere offer to sell has not been deemed such a dealing with the goods as constitutes an acceptance. *Smith v. Surman*, 9 B. & C. 561." See *Flintoft v. Elmore*, 18 U. C. C. P. 274.

(l) 1 East 195.

(m) 7 Taunt. 597. See, also, *Lillywhite v. Devereux*, 15 M. & W. 235, and *Baines v. Jevons*, 7 C. & P. 238.

have done an act inconsistent with the continuance of a right of property in his vendor, and to have accepted within the meaning of the statute.

§ 145. In *Beaumont v. Brengeri*, (n) where the defendant bought a carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, held, that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop.

But in *Maberley v. Sheppard*, (o) the action was for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the progress of the work furnished the iron work and sent it to plaintiff, and sent a man to help plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to acceptance. The court took time to consider, and Tindal, C. J., delivered the decision that the plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in plaintiff's yard for further work till it was finished. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance."

§ 146. In *Parker v. Wallis*, (p) the defendants received some turnip-seed under a verbal contract of sale, but sent word at once to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags, and laid it out thin, alleging that it was hot and mouldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was nonsuited by Wightman J., and leave reserved to enter a verdict for £140, the price of the seed, if the evidence sufficed to show acceptance and

(n) 5 C. B. 301.

(p) 5 E. & B. 21.

(o) 10 Bing. 99.

actual receipt of any part of the goods. The court made the rule absolute for a new trial, but refused to enter verdict for plaintiff. Held, that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff had authorized it. But, as the evidence stood, when the nonsuit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a wrongful act, if the defendants had not accepted as owners. This was a question for the jury.

In *Kent v. Huskisson*, (q) there was an actual receipt, but no acceptance. The buyer gave an order for sponge, at 11s. per pound. On arrival of the package it was examined, and judged to be worth not more than 6s. per pound. He at once returned it by the same carrier. Held, no acceptance.

Kent v. Huskisson.

§ 147. A dealing with goods, so as to justify a jury in finding a constructive acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves. (r) ⁶

Dealing with bill of lading.

§ 148. Very deliberate consideration was given to the whole subject by the Queen's Bench, in the important case of *Morton v. Tibbett*. (s) The facts were that on the 25th of August, defendant made a verbal agreement with plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a certain specified weight. Defendant, by agreement, sent a general carrier next morning to a place named, and the wheat was then and there received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the meantime, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier, who had received it without its

Morton v. Tibbett.

(q) 3 B. & P. 233.

(r) *Currie v. Anderson*, 29 L. J., Q. B. 87, and 2 E. & E. 592; *Meredith v. Meigh*, 22 L. J., Q. B. 401, and 2 E. & B. 364.

Garfield v. Paris, 96 U. S. 557, 563;

Adoue v. Seeligson, 54 Tex. 593; *Quintard v. Bacon*, 99 Mass. 185; *Frostburg, &c., Co. v. N. E. Glass Co.*, 9 Cush. 118.

(s) 19 L. J., Q. B. 382, and 15 Q. B.

6. *Rodgers v. Phillips*, 40 N. Y. 519; 423.

being weighed, and neither defendant, nor any one in his behalf, had seen it weighed. The action was debt for goods sold and delivered, and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for nonsuit. The judgment of the court was unanimous after taking time for consideration, the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods, and actually received the same, so as to render him liable as buyer.

Lord Campbell said that it would be very difficult to reconcile the cases on the subject, and that the exact words of the 17th section had not always been kept in recollection. After referring to the language, he added: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the *residue*; and even where the sale is by sample, that the residue offered does not correspond with the sample." His Lordship then continued, by announcing that: "We are of opinion that there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The *acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*"⁷

7. In *Garfield v. Paris*, 96 U. S. 557, 562, stated in note 3, *supra*, it was argued by counsel for the buyer that the mere receipt of labels for liquor bought, was not a part acceptance, because it could not prevent the buyer from rejecting the liquor if, when received, it proved inferior to the stipulated quality. Justice Clifford said: "Authorities, almost numberless, hold that there is a broad distinction between the principles applicable to the formation of the contract and those applicable to its performance, which appears with sufficient clearness from the language of the statute. There must be some memoran-

dum, but the same statute concedes that the party becomes liable for the whole amount of the goods if he accepts and receives part." Therefore, he says, the contract may be held good by part acceptance however small, though it does not preclude the purchaser from refusing the residue of the goods if they do not accord with the contract. In *Remick v. Sandford*, 120 Mass. 309, 316, Devens, J., said: "There may, undoubtedly, be an acceptance which will not afford conclusive evidence that the contract has been fulfilled and its terms complied with, and which will yet satisfy the statute and let

§ 149. The distinction pointed out in this last clause is important, and should not be lost sight of. The question presented to the court may be, whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half-pound of sugar, in *Hinde v. Whitehouse*), (t) in order that the contract may "be allowed to be good;" and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the vendor fails to comply with the contract as proven.

Distinction between formation and performance of the contract.

The decision of Lord Campbell then closed with declaring: "We are therefore of opinion that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it."

§ 150. There was very plain evidence that the defendant *received* it, but the only proof of *acceptance* was the fact of the resale before examination. The decision, therefore, goes no farther, it would seem, than to determine that this was such an exercise of dominion over goods bought as is inconsistent with a continuance of the right of property in the vendor, and therefore evidence to justify a jury in finding acceptance as well as actual receipt by the buyer. Martin, B., in *Hunt v. Hecht*, (u) declared that this was the whole scope of the decision; and again, in *Coombs v.*

Remarks of different judges on *Morton v. Tibbett*.

in evidence of those terms which otherwise could only be proved by writing. If the buyer accepts the goods as those which he purchased, he may afterwards reject them, if they are not what they were warranted to be, but the statute is satisfied." See *McMaster v. Gordon*, 20 U. C. C. P. 16; *Pinkham v. Mattox*, 53 N. H. 600. In *Hewes v. Jordan*, 39 Md. 472, 483, Alvey, J., said: "The effect of the acceptance and actual receipt of part of the goods, however small, is to prove the contract of sale, and it is not inconsistent with this that the vendee should have the right with respect to the *residue*

of the goods when offered in fulfillment of the contract, to object that they are not such, in quantity and quality, as the contract requires." But, except with this qualification, he demurs to the *dictum* of Lord Campbell, in *Morton v. Tibbett*, that there may be an acceptance and receipt without the purchaser having done anything to preclude him from contending that the goods actually received do not correspond with the contract. See *Bacon v. Eccles*, 43 Wis. 227, 236.

(t) 7 East 558.

(u) 8 Ex. 814.

Martin, B. Bristol and Exeter Railway Company, (x) expressed his dissent from the principles maintained in the opinion pronounced by Lord Campbell. In *Castle v. Sworder*, (y) **Cockburn, C. J.**, said: "It must not be assumed that I assent to the decision in *Morton v. Tibbett*."

§ 151. On the other hand, **Blackburn, J.**, in delivering the opinion of the court in *Cusack v. Robinson*, (z) on the 25th of May, 1861, just ten days after this observation of the Chief Justice in *Castle v. Sworder*, cites *Morton v. Tibbett* as authority for the proposition—"that the acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined." The court, on this occasion, was composed of only two judges, **Blackburn and Hill, JJ.** In the same court, in February, 1860, **Crompton, J.**, had stated, in the case of *Currie v. Anderson*, (a) "that before the case of *Morton v. Tibbett*, there was authority for saying that there could have been no acceptance and receipt within the statute of frauds until the vendee had been placed in such connection with the goods that he could not object to them on account of their quantity and quality; and in that case Lord Campbell says, if that is the law, it would be decisive against the plaintiff, but after a careful review of the cases, the court came to the conclusion (which, in this court, must be considered to be the law of the land), that in order to make an acceptance and receipt within the statute of frauds, *it is not necessary that the vendee should have done anything to preclude himself from objecting to the goods.* That was the decision in *Morton v. Tibbett*, and from the discussion to-day, I have more reason than ever to be satisfied with it."

It is fair to assume from the foregoing review, that, notwithstanding the observation of **Cockburn, C. J.**, in *Castle v. Sworder*, the law is considered to be settled in the Court of Queen's Bench in conformity with the decision in *Morton v. Tibbett*, and that the authority of that case remains unshaken in that court.

§ 152. In the Exchequer, however, the leaning of the judges is evidently adverse to the construction placed in the Queen's Bench

(x) 3 H. & N. 510; 27 L. J., Ex. 401. 261.

(y) 6 H. & N. 832; 30 L. J., Ex. 310. (a) 2 E. & E. 592; 29 L. J., Q. B. 87.

(a) 1 B. & S. 299, and 30 L. J., Q. B.

upon this clause of the statute, though in no case has there been a decided rejection of the authority of *Morton v. Tibbett*.

Hunt v. Hecht (b) was decided in 1853, and, therefore, prior to the more recent cases in which the judges of the Queen's Bench showed what was, in the opinion of that court, the full extent of the decision in *Morton v. Tibbett*. ^{*Hunt v. Hecht*} The facts were, that a number of bags of bone were sent by defendant's order to his wharfinger, in compliance with a verbal contract with plaintiff. The defendant went to plaintiff's warehouse, and there inspected a heap of ox bones mixed with others inferior in quality. Defendant objected to the latter, but verbally agreed to purchase a quantity of the others, to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, as soon as he heard of their being sent to the wharf, and he at once refused to accept them. Held, no acceptance. All the judges put the case on the ground of the goods sold having been mixed in bulk with others, so that no acceptance was possible till after separation, and there was no pretence that there had been an acceptance after separation, otherwise than by the wharfinger's receipt, which was insufficient for that purpose, but Martin, B., said: "There are various authorities to show that for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the articles sent. *Morton v. Tibbett* has been cited as an authority to the contrary, but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court, indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; *it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.*"

§ 153. In the case of *Coombs v. The Bristol and Exeter Railway*

(b) 8 Ex. 814; 22 L. J., Ex. 293.

*Coombs v.
Bristol and
Exeter Rail-
way Company.*

Company, (c) decided in 1858, the same court had occasion to review the subject, and Pollock, C. B., said that *Hunt v. Hecht* had decided "that the vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance." Martin, B., said, "No doubt in *Morton v. Tibbett* the Court of Queen's Bench carried out the principle of constructive acceptance to an extent which in that case was correct: but I adhere to that which I said in *Hunt v. Hecht*, that much that was there said is doubtful, and that acceptance, to satisfy the statute, must be after the opportunity of exercising an option, or after the doing of some act waiving it." Bramwell, B., said without qualification, "The cases establish that there can be no acceptance where there has been no opportunity of rejecting." Watson, B., concurred.

§ 154. The subject of acceptance under the statute again arose in *Smith v. Hudson*, (d) decided in the Queen's Bench in Easter Term, 1865. All the cases were reviewed by able counsel, and commented on by the judges in the course of the argument. The plaintiffs were assignees of Willden, a bankrupt. The defendant, on the 3d of November, 1863, sold to Willden by verbal contract a quantity of barley, according to sample. The bulk was conveyed by the vendor in his own wagons to the railway station, on the 7th of November, and he gave orders to convey and deliver it to the purchaser. It was admitted that by the custom of the trade the purchaser, notwithstanding the delivery of the bulk at the station, had the power of rejecting the goods if found not equal to sample. On the 9th of November Willden was adjudicated a bankrupt on his own petition, without having given any orders or directions about the barley, which still remained at the railway station, nor had he examined it or given any notice whether he accepted or declined it. Nothing had been paid on account of the price, and on the 11th of November the vendor gave notice to the railway company not to deliver the goods to any one but himself. The corn was given up to the vendor by the company, and the assignees of Willden claimed it as the property of the bankrupt. On the question whether there had been an acceptance under the statute of frauds, held by all the judges, Cockburn, C. J., Blackburn, Mellor, and Shee, JJ., that the contract could not be allowed to be good. The Chief Justice held *Hunt v. Hecht* to be binding on the court as an authority, that where the

(c) 3 H. & N. 510; 27 L. J., Ex. 401.

(d) 6 B. & S. 431; 34 L. J., Q. B. 145.

buyer has a right to inspect the articles sold to see whether they are in accordance with the contract, there is no acceptance till he has time to make the inspection. Blackburn, J., said, "There must be both acceptance and receipt to bind both purchaser and vendor under the statute." And in all the opinions it was held that the countermand of the vendor before the goods had been delivered according to his order, and before acceptance, put an end to the contract, and deprived the assignees of the power to accept, on behalf of the bankrupt.

§ 155. [The authority of *Morton v. Tibbett* was fully recognized, and its principle adopted by the Court of Appeal in the case of *Kibble v. Gough*, decided in 1878. (e) The plaintiff verbally agreed to sell barley to the defendant, the same to be well dressed and equal to sample. In the defendant's absence his foreman received the barley, which was delivered in several installments, examined it, and gave a receipt for each installment, with the words, "not equal to sample." The defendant afterwards personally examined the barley, and rejected it on the ground that it was not properly dressed and not equal to sample.

In an action for goods sold and delivered the jury found, in answer to questions left to them by Pollock, B., at the trial: 1st, that there was an acceptance by the defendant of part of the barley; and 2dly, that the barley was equal to sample and properly dressed. Upon the argument of a rule for a new trial, obtained on the ground of misdirection, and that the verdict was against the weight of evidence, it was argued for the defendant that there was misdirection on the part of the judge in holding that there was any evidence to go to the jury of acceptance under the statute of frauds, upon the ground apparently (f) that the defendant's foreman having given a receipt with the words "not equal to sample" upon it, could not be held to have accepted it within the meaning of the statute, and that the question, therefore, whether it was equal to sample or not, never arose, because there was no valid contract between the parties. The authority of *Morton v. Tibbett* was attacked, but all the Lords Justices (Bramwell, Brett, and Cotton) referred with approval to the principle there laid down, and held that there was evidence for the jury of an acceptance sufficient to satisfy the statute. That being so, the question

(e) 38 L. T. (N. S.) 204. See, also, another point. *Grimoldby v. Wells*, L. R., 10 C. P. 391, (f) The report is somewhat involved. where, however, the decision turned upon

whether the barley was equal to sample or not was clearly one for the jury to decide, and they had answered it in favor of the plaintiff. Lord Justice Brett refers in these terms to the acceptance necessary under the statute: "There must be an acceptance and an actual receipt; *no absolute acceptance but an acceptance which could not have been made except on admission of the contract, and that the goods were sent under it.* I am of opinion there was a sufficient acceptance under the statute of frauds, although there was (still) a power of rejection." And then, after reviewing the cases and referring with approval to *Morton v. Tibbett*, he adds: "The goods then were sold *by valid contract*, actually delivered and received, and after this the vendee objects to them. *If they had not been equal to the sample, I say that it was not even then too late to object*; but they were equal to sample and they were (properly) dressed."

And Cotton, L. J., says, "All that is wanted is a receipt, and such an acceptance of the goods as shows that it *has regard to the contract*: but the contract may yet be left open to objection."⁸

§ 156. In *Rickard v. Moore*, (g) decided in the same year, the plaintiff verbally sold by sample to the defendant six bales of wool. The goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken home by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff that two bales were inferior to sample, asking what was to be done in the matter. Plaintiff replied denying that the bales were not equal to sample. The defendant was away from home when this letter arrived. Four days afterwards he returned home, and after reading the plaintiff's letter sent the goods back to the railway station, and telegraphed to the plaintiff rejecting them. During these four days the defendant admitted that he had offered the goods for sale in the market, stating, however, that he had not accepted them, and that he would have to make other arrangements before he could sell. In an action for goods sold and delivered the defendant (*inter alia*) pleaded, first, that there was no acceptance or actual receipt to take the case out of the statute of frauds; and, secondly, that he had properly rejected the goods as not equal to sample. *The jury found at the trial that two of the bales were not equal to sample*, and Hawkins, J., thereupon directed a verdict, and gave judg-

8. That the acceptance must be with regard to the contract, see note 2, *supra*. (g) 38 L. T. (N. S.) 841, C. A.

ment for the defendant. On appeal, Bramwell, L. J., held both points in the defendant's favor, distinguishing *Kibble v. Gough* upon the question of acceptance within the statute of frauds, upon the ground that in that case the jury had found that there was in fact an acceptance of the goods by the defendant, and that there was evidence to justify that finding. In this judgment Baggallay, L. J., concurred. Thesiger, L. J., while not differing from the judgment of Bramwell, L. J., preferred to rest his judgment upon the second point taken, viz., that whether or not there was an acceptance to satisfy the statute, the defendant had done nothing to waive his right to reject the goods as not equal to sample, and the jury had found as a fact that the goods were not equal to sample. *Morton v. Tibbett*, though cited in the argument, is not directly referred to in the judgments, but it is quite clear from what was said by Bramwell and Thesiger, L. JJ., that both recognized and adopted the distinction between an acceptance such as would satisfy the statute of frauds, *in other words a conditional acceptance*, and an acceptance of the goods as equal to sample.]

§ 157. The case of *Smith v. Hudson*, (*h*) already referred to, *ante* § 154, is worthy of note, also, on another ground. It clearly recognizes and maintains the long-established doctrine that the acceptance and actual receipt are distinct things, both of which are essential to the validity of the contract. This would seem sufficiently clear from the language of the statute, but on more than one occasion remarks had been made by eminent judges suggesting doubt upon the question. Thus, in *Castle v. Swarder*, (*i*) *Crompton, J.*, said, "I have sometimes doubted whether there is much distinction between receipt and acceptance;" and *Cockburn, C. J.*, said, "I think those terms (*i. e.*, acceptance and receipt) are equivalent." In *Marvin v. Wallace*, (*j*) also, *Erle, J.*, said, according to one report, "I believe that the party who inserted the words had no idea what he meant by acceptance. That opinion I found on the everlasting discussion which has gone on, as if possession according to law could mean only manual prehension." It is probable, however, both from the context and from the point in dispute, that his Lordship is more correctly represented in another report, as saying, "I believe that the persons who framed the statute, and in-

Acceptance
and actual
receipt are
distinct.

(*h*) 5 B. & S. 431; 34 L. J., Q. B. 145. (*j*) 6 E. & B. 726; 25 L. J., Q. B. 389.
(*i*) 6 H. & N. 832; 30 L. J., Ex. 810.

serted the words 'actually received the same,' had no clear idea of their meaning," &c. It may confidently be assumed, however, that the construction which attributes distinct meanings to the two expressions, "acceptance" and "actual receipt," is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith v. Hudson*.⁹

§ 158. Acceptance by the vendee may be prior to the actual receipt of the goods, as for instance, when he has inspected and approved the specific goods at or before the time of purchasing.¹⁰ Thus, in *Cusack v. Robinson*,⁽¹⁾ where the buyer was shown a lot of one hundred and fifty-six firkins of butter, in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the

Acceptance
may precede
receipt.

*Cusack v.
Robinson.*

9. In *Cooke v. Millard*, 65 N. Y. 368, the court says of these remarks of Crompton, J., and Cockburn, C. J.: "These remarks cannot be regarded as of any weight, being contrary to the decided current of authority." See *Stone v. Browning*, 68 N. Y. 598; *Cross v. O'Donnell*, 44 N. Y. 661.

10. Acceptance may precede Receipt. —*Cross v. O'Donnell*, 44 N. Y. 661; *Garfield v. Paris*, 96 U. S. 566; *Ex parte Safford*, Re Downing, 2 Low. 563; *Hewes v. Jordan*, 39 Md. 472, 484; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Jackson v. Watts*, 1 McCord 288. In *United States Reflector Co. v. Rushton*, 7 Daly 410, plaintiff's clerk testified that he sold defendant four reflectors for \$150, to be paid as soon as put up, and that they were delivered and not paid for. Both parties rested and both claimed judgment, the defendant on the ground that there was no evidence of acceptance. Daly, C. J., said that the purchase being of specific articles which defendant saw, acceptance would be presumed before receipt. "If a man goes into a store and selects an article of furniture at a price which he agrees to pay when it is deliv-

ered, and the proof is that that particular article is delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance within the meaning of the statute." A case very similar to *Cusack v. Robinson*, stated in the text, *supra*, is *Heermance v. Taylor*, 14 Hun 149. The plaintiff offered the defendant butter out of a lot of forty firkins in plaintiff's store in New York, for a certain price per pound. The buyer tried several firkins and then said he would take twenty; and those tried with enough more to make twenty were sent to him at Albany and placed in his cellar. He offered them for sale soon after and then examined them, and being dissatisfied shipped them back to New York. The court held that there was no acceptance. The only circumstance to distinguish this case from that of *Cusack v. Robinson* is that in the latter case the whole lot offered for examination was purchased, while in *Heermance v. Taylor* the seller selected twenty out of a lot of forty. But as the buyer authorized the seller to make this selection, and the seller did make it, the difference seems an immaterial

(1) 1 B. & S. 299; 30 L. J., Q. B. 261.

goods were then forwarded to the purchaser by a carrier according to his directions; it was held that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded, was a compliance with the statute. This question was raised, but not decided, in *Saunders v. Topp*, (m) which is referred to by Blackburn, J., in delivering the opinion of the court in *Cusack v. Robinson*.

§ 159. In deciding *Cusack v. Robinson*, the court distinguished it from *Nicholson v. Bower*, (n) because in the latter case ^{*Nicholson v. Bower*.} there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of about one hundred and forty quarters of wheat, by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and after inspecting it, told him not to cart the wheat home at present. The purchasers were really in insolvent circumstances, and immediately after the interview with the carman determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. All the judges held, that there had been no acceptance in fact, and the assignees of the purchasers were not allowed to retain a verdict in their favor.

In *Saunders v. Topp*, (o) the defendant had selected forty-five couple of ewes and lambs at the plaintiff's farm, and ordered ^{*Saunders v. Topp*.} them to be sent to his own farm, where they were received by his agent. He then ordered them to be sent to another place, where he saw them and counted them over, and said, "it is all right." The court declined to decide whether the previous selection was equivalent to an acceptance (a point subsequently decided in the affirmative in *Cusack v. Robinson*, *ut supra*,) but held that the subsequent action of the defendant was sufficient to justify the jury in finding an acceptance after delivery.

§ 160. In one case, (p) Maule, J., seems to have been strongly of

terial one. Apparently the possibility of acceptance before receipt was not presented to or considered by the court, and it seems probable that a different judgment would have been rendered if the attention of the court had been called to

the case of *Cross v. O'Donnell*, *supra*.

(m) 4 Ex. 390.

(n) 1 E. & E. 172; 28 L. J., Q. B. 97.

(o) 4 Ex. 390.

(p) *Fricker v. Tomlinson*, 1 M. & G. 772.

Acceptance
after action
brought.

opinion that it was sufficient to prove acceptance of part of the goods by the buyer, *after action brought*, but the court declined to decide the point without further argument, and the case was settled. All the recent authorities are adverse to this *dictum*, which rested upon the assumption that the fact of acceptance was a mere question of evidence, whereas the statute makes it essential to the validity of the contract in a court of justice. The report of the case shows that the judges had not the language of the statute before them. The point is also ruled adversely to this opinion of Maule, J., in *Bill v. Bament*. (g) 11

Carrier has
no authority
to accept.

§ 161. It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept the goods for their employers. (r) 12

(g) 9 M. & W. 36.

11. In *Townsend v. Hargraves*, 118 Mass. 336, Colt, J., arguing that an oral sale is always valid, the statute only barring the remedy, said: "Except that the statute provides that no action shall be brought, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient."

An Acceptance need not be Contemporaneous with the Sale.—This is taken for granted in the English cases, but the question has been often raised in America, probably because the statute of frauds in several states requires that part *payment* must be at the time of the sale, and it has been supposed that the courts might extend the principle to acceptance of part. See *Seymour v. Davis*, 2 Sandf. S. C. 239. But all the recent decisions hold that the acceptance may be subsequent to the sale, and that the length of time that intervenes makes no difference, provided it appears satisfactorily that both parties act with intent to execute the oral contract. *Sprague v. Blake*, 20 Wend. 63, followed in *Rickey v. Tenbroeck*, 83 Mo. 563, 569, and *Sale v. Darragh*, 2 Hilt.

184; *McKnight v. Dunlop*, 5 N. Y. 544. In this case Paige, J., said: "The oral contract may be considered good as a proposition; and the subsequent delivery and acceptance of the whole or a part of the goods as an acceptance of the proposition, and the final conclusion of a valid agreement." (This it must be observed is said relative to the New York act, which makes the contract void, unless there is acceptance; in Massachusetts the contract upon acceptance takes effect from the time of the oral sale, from which date the buyer takes the risk of loss of the goods. See *Townsend v. Hargraves*, *supra*.) See *Van Woert v. Albany & S. R. R.*, 67 N. Y. 538; *Field v. Runk*, 22 N. J. L. 525, 530; *Matthiessen, &c., Co. v. McMahon*, 38 Id. 536, 538; *Damon v. Osborne*, 1 Pick. 481; *Marsh v. Hyde*, 3 Gray 331; *Davis v. Moore*, 13 Me. 424, 427; *Bush v. Holmes*, 53 Id. 417; *McCarthy v. Nash*, 14 Minn. 127, 131; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Buckingham v. Osborne*, 44 Conn. 133, 139; *Anson v. Dreher*, 35 Wis. 615, 618.

(r) *Astey v. Emery*, 4 M. & S. 262; *Hanson v. Armitage*, 5 B. & Ald. 557; *Johnson v. Dodgson*, 2 M. & W. 656;

12. **The Receipt of Goods by a Buyer.**—As to receipt by a carrier, see § Carrier is not an Acceptance by the 181, *infra*. Story, in his treatise on Sales,

§ 162. Among the numerous cases in which the courts have set aside verdicts on the ground that the jury had found acceptance by

Norman v. Phillips, 14 M. & W. 276; *Hunt v. Hecht*, 8 Ex. 814; *Acebal v. Levy*, 10 Bing. 376; *Meredith v. Meigh*, 2 E. & B. 370, and 22 L. J., Q. B. 401, in which *Hart v. Sattley*, 3 Camp. 528, is overruled; *Cusack v. Robinson*, 1 B. & S. 299, and 30 L. J., Q. B. 261; *Hart v. Bush*, E., B. & E. 494, and 27 L. J., Q. B. 271; *Smith v. Hudson*, 6 B. & S. 481, 34 L. J., Q. B. 145.

says: "No receipt of goods by a carrier or middleman on their way to the buyer is a sufficient acceptance, unless such carrier or middleman be the general agent of the vendee having authority finally to accept them." This is approved by Woodruff, J., in *Rodgers v. Phillips*, 40 N. Y. 530. And he further says: "It has sometimes been argued that delivery to a carrier designated by the buyer will suffice, although delivery to a general carrier will not; but this distinction cannot be sustained where the carrier has no other authority than to transport the goods." This last sentence was a *dictum*, and two of the judges would not assent to it. But the principle stated is now well established. In *Allard v. Greasert*, 61 N. Y. 1, 5, the buyer had designated an express company as the carrier, to whom the goods were delivered. Earl, C., said: "There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act, requiring the exercise of no discretion. But there is no reason for holding that the buyer intended in such case to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing. The goods were boxed, the carrier could know nothing about them, and its agents had no right to inspect and handle them. Its sole duty and authority was to receive and transport them. In such a case it would be absurd to hold

that the carrier had an implied authority from the buyer to accept the goods for him. * * * It will be found that in most of the cases where a delivery to a carrier has been held to satisfy the statute, there had been a prior acceptance of the goods by the buyer or his agent." *Wilcox, & Co. v. Green*, 72 N. Y. 17; *Lloyd v. Wright*, 20 Ga. 574; S. C., 25 Ga. 215; *Denmead v. Glass*, 30 Ga. 637; *Hausman v. Nye*, 62 Ind. 485; *Keiwert v. Meyer*, 62 Id. 587, citing *Allard v. Greasert*, *supra*; *Jones v. Mechanics' Bank*, 29 Md. 287; *Frostburg Mining Co. v. New Eng. Glass Co.*, 9 Cush. 115; *Quintard v. Bacon*, 99 Mass. 185; *Johnson v. Cuttle*, 105 Mass. 447; *Atherton v. Newhall*, 123 Id. 141; *Maxwell v. Brown*, 39 Me. 98; *Grimes v. Van Vechten*, 20 Mich. 410; *Tower v. Tudhope*, 37 U. C. Q. B. 200, 210. In *Spencer v. Hale*, 30 Vt. 315, it was held that a carrier designated by the buyer to receive the goods bought was thereby authorized to accept. But the case was also put upon the more solid ground of unreasonable delay in rejecting the goods after receipt of them by the buyer. See § 163, *infra*.

An Authorized Agent may Accept.—*Outwater v. Dodge*, 6 Wend. 397; *Barkley v. Rensselaer & S. R. R.*, 71 N. Y. 205; *Gray v. Davis*, 10 N. Y. 285; *Allard v. Greasert*, 61 N. Y. 1; *Rogers v. Gould*, 6 Hun 229; *Snow v. Warner*, 10 Metc. 182; *Quintard v. Bacon*, 99 Mass. 185; *Tower v. Tudhope*, 37 U. C. Q. B. 200, 210.

But the Same Person Cannot be Agent Both to Sell and to Accept.—In *Caulkins v. Hellman*, 47 N. Y. 449,

the buyer without sufficient evidence, some may be found which are not readily reconcilable with the principle that a dealing with the article in a manner inconsistent with the continuance of the right of property in the vendor is a constructive acceptance.

Curtis v. Pugh (r) is an instance of this class. The action was debt, for goods sold and delivered. The purchaser had given a verbal order for three hogsheads of Scotch glue, to be of the description called "Cox's best." The plaintiff, the vendor, sent two hogsheads, all that he was able to deliver at the time, to a wharf in London. Defendant removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior to the quality ordered, and so informed plaintiff's agent on the next day. The plaintiff's brother admitted, on inspection two days later, that part of the glue, but not an unusual proportion, was inferior, and offered to make an allowance, but refused to take it back because it had been unpacked and put into bags, which was not necessary for the purpose of examination, and because the glue, when once unpacked, could not be replaced in the same condition in the hogsheads. Lord Denman, C. J., was of opinion that the defendant had not in fact intended to accept the glue, but told the jury that "if the defendant had done any act *altering the condition of the article*, that was an acceptance, and that the question for them was whether or not the act of putting the glue into bags had altered its condition." The Lord Chief Justice then left it to the jury to say "whether the glue was 'Cox's best,' and whether the defendant *had dealt with it so as to make it his own*," or had done no more than was necessary to examine the quality. All these questions were decided in plaintiff's favor by the jury, but the court, on motion, pursuant to leave reserved, directed a nonsuit, Lord Denman saying, "In what I stated I certainly car-

the buyer requested the seller's agent to make the best bargain he could for the freight of the goods sold, on their shipment to the buyer. The court held that this did not give the agent any authority to accept for the buyer. On a new trial it was further in evidence that the buyer said to the seller's shipping agent: "I want you to be very particular and see that this wine corresponds with the sample." On this, plaintiff obtained a ver-

dict, but the Supreme Court reversed it. 14 Hun 330. Talcott, P. J., said: "The agreement for the sale and the acceptance by the vendee of the thing sold are too intimately connected as parts of the same transaction, in this case, to authorize one person to act as agent of both parties." And he further reasons that the language used was a mere caution, and did not authorize the agent to accept. (r) 10 Q. B. 111.

ried the doctrine, as to acceptance, a step further than I ought." Patteson, J., said, "My Lord Chief Justice went a step further in his ruling than the authorities warrant," and Coleridge and Wightman, JJ., concurred.

This case appears to be identical in principle with *Parker v. Wallis*, 5 E. & B. 21, and the two decisions to be irreconcilable. The jury having found the facts in favor of plaintiff, there was ample evidence of a dealing with the goods which was wrongful unless the buyer was owner, and the constructive acceptance was therefore complete, according to the more recent decisions.

§ 163. The cases are not entirely consistent on the point whether mere silence and delay of the purchaser in notifying refusal of goods forwarded by his order suffice to constitute constructive acceptance. The fair deduction from the authorities seems to be that this is a question of degree, that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter time would merely constitute *some* evidence to be taken into consideration with the other circumstances of the case. 13

In *Bushel v. Wheeler*, (s) in the Court of Queen's Bench, defendant ordered certain machinery to be sent to him at Hereford by the Hereford sloop. It was sent on the 23d of April, and an invoice for the goods at three months' credit was forwarded in a letter of advice to defendant on the 25th of April. The carrier placed the goods in a warehouse on his own wharf on their arrival at Hereford, and notice was given to defendant. No communication on the subject of the goods was made by defendant till the 7th of October, when they were rejected. The defendant proved, however, that after the arrival of the goods at the warehouse, he had seen them, and informed the warehouseman that he did not intend to take them. Erskine, J., directed a verdict for defendant, with leave to move to enter a verdict for plaintiff. The court refused to enter a verdict for plaintiff, but held that there was evidence of acceptance to go to the jury, and ordered a new trial. Lord Denman said that the "lapse of time, connected with the other circumstances, might show

Parker v. Wallis.

Silence and delay as proofs of acceptance.

Bushel v. Wheeler.

13. It is a question for the jury whether unreasonable delay in rejecting goods, or negligence in dealing with them so that they are lost or damaged, amounts to an acceptance. *Borrowdale v. Bosworth*, 99 Mass. 381; *Downs v. Marsh*, 29 Conn. 409; *Tower v. Tudhope*, 37 U. C. Q. B. 200, 212; *Spencer v. Hale*, 30 Vt. 314; *Goff v. Homeyer*, 59 Mo. 345; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17 (s) 15 Q. B. 442.

an *acceptance*, and this was a question of fact for the jury." Williams, J., said that there might be a constructive *receipt* as well as delivery: and "it being once established that there may be an *actual receipt* by acquiescence, wherever such a case is set up, it becomes a question for the jury." Coleridge, J., said that the goods were carried by vendee's orders within a reasonable time to a particular warehouse. "That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods and return them if they did not correspond to order. But here the vendee took no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary."

§ 164. In *Norman v. Phillips*, (t) in the Exchequer, the court felt bound by *Bushel v. Wheeler*, but declined to apply it to the case before them. Defendant ordered from plaintiff certain yellow deals, with directions to send them to a specified station of the Great Western railway, to be forwarded to him as on previous occasions. The order was given on the 17th of April, the deals arrived at the station on the 19th, on which day the defendant was informed of the arrival by the railway clerk, and said he would not take them. An invoice was sent on the 27th of April, which defendant received and kept, but it did not appear that he had ever seen the deals. On the 28th of May, defendant informed plaintiff that he declined to take the goods. Pollock, C. B., refused to nonsuit, and directed the jury to find for plaintiff, with leave reserved to defendant to move for nonsuit or verdict for him. All the judges concurred in making the rule absolute. Alderson, B., remarked during the argument that it was difficult to distinguish the case from *Bushel v. Wheeler*, and it is perceptible, from the language of all the judges, that they did not yield entire assent to that case. *Bushel v. Wheeler* was, however, mentioned as a "well-considered case" in *Morton v. Tibbett* (ante § 148): and in *Parker v. Wallis*, (u) Lord Campbell said *arguendo*, that "detention of the goods for a long and unreasonable time by the vendee is evidence that he has accepted them." In *Smith v. Hudson*, 34 L. J., Q. B. 145, Blackburn, J., refers to *Morton v. Tibbett* as establishing that lapse of time is *some* evidence of acceptance; and observations to a similar effect are to be found in the opinion delivered by Parke, B., in *Cunliffe v. Harrison*, 6 Ex. 906.

(t) 14 M. & W. 277.

(u) 5 E. & B. 21.

§ 165. In *Nichols v. Plume*, (x) a quantity of cider was sent to defendant, who had ordered it verbally, but he refused to receive it, and caused it to be lodged in a warehouse in the neighborhood not belonging to him. The cider was not returned to plaintiff, nor did defendant send him any notice of his intention not to use it. Best, C. J., held that there had been no acceptance under the statute. The report does not show the length of the delay which elapsed, nor was the question raised whether there had been constructive acceptance by unreasonable delay.

*Nichols v.
Plume.*

§ 166. When goods are marked with the name of the purchaser, by his consent, this constitutes an acceptance of the goods, if all the terms of the contract have been agreed on, but not an actual receipt, and the sale cannot be allowed to be good, without further proof of delivery. (y) ¹⁴

*Marking the
goods.*

The acceptance of part of the goods bought makes the contract good for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured. ¹⁵

*Where some
of the goods
not yet in
existence.*

(x) 1 C. & P. 272.

(y) *Bill v. Bament*, 9 M. & W. 36; *Balday v. Parker*, 2 B. & C. 37; *Proctor v. Jones*, 2 C. & P. 532; *Hodgson v. Le Bret*, 1 Camp. 233; *Boulter v. Arnott*, 1 C. & M. 334; *Anderson v. Scott*, in note to *Hodgson v. Le Bret*, 1 Camp. 235, in which Lord Ellenborough held, that the cutting off the pegs by which the wine in casks was tasted, and the marking of defendant's initials on the cask in his presence, was an incipient delivery, sufficient to take the case out of the statute. But this case was disapproved by Best, C. J., in *Proctor v. Jones*, *supra*, and by Alderson, B., in *Saunders v. Topp*, 4 Ex. 390. In Mr. Chitty's valuable treatise on Contracts, he cites the foregoing authorities in support of the principle, that, "in no case can the marking of goods with the name of the purchaser by his consent constitute an acceptance within the act, unless it appear from the evidence that the goods have been delivered to the purchaser." P. 375, 11th ed. It is submitted that a thorough examination of

the cases will show the true principle to be more accurately stated as given in the text above, than in the foregoing passage in the treatise on contracts.

14. In *Rapleye v. Adees*, 1 N. Y. Sup. Ct. (T. & C.) 127, sheep were caught and marked with the name of the buyer, who assisted, and were then returned to the field of the seller, who agreed to keep them a few days. *Held*, an acceptance and receipt. *Woodford v. Patterson*, 32 Barb. 630; *Dyer v. Libby*, 61 Me. 45.

15. *McKnight v. Dunlop*, 5 N. Y. 537; *Gault v. Brown*, 48 N. H. 183; *Ross v. Welch*, 11 Gray 235; *Sloan Saw Mill Co. v. Guttshall*, 8 Col. 8; *Robinson v. Gordon*, 23 U. C. Q. B. 143. *Scott v. Eastern Counties*, cited in the text, was followed in *O'Brien v. Credit Valley R. W. Co.*, 25 U. C. C. P. 275; affirmed, on appeal, *Id.* 283. It was a suit on an oral contract by a railway company with the plaintiff to draw and deliver stone at a certain price per "toise," until he was told to stop. Part having been accepted, the court held the company liable for the rest afterwards

In *Scott v. The Eastern Counties Railway Company*, (z) the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, was of a very peculiar construction, and was not ready for delivery until nearly two years after the order. In the meantime, and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was objected on action brought that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of that lamp. The court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them, made the contract good for all.

§ 168. In *Elliott v. Thomas*, (a) there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke, B., in giving the decision, explained *Thompson v. Maceroni*, (b) in which the language of the opinion seemed adverse to the view taken by the court, by showing that this last-named case turned entirely on the form of the action, which was for goods *sold and delivered*, an action clearly not maintainable for such part of the goods as had not been actually delivered to the buyer.¹⁶

delivered. But see *Scotten v. Sutter*, 37 Mich. 527, which seems to hold part acceptance of cigars *not specific* when sold, as having no effect to take the entire contract out of the statute; but perhaps this case may be explained on the principle that the part deliveries were not accepted with reference to the contract. See note to case of *Rohde v. Thwaites*, stated by our author in his chapter on "Subsequent Appropriation." In *Swigart v. McGee*, 19 Ark. 473, it appeared that three hundred bushels of corn were sold out of a bin containing more, and one hundred bushels being delivered and paid for, the entire contract was held to be taken out of the statute.

(s) 12 M. & W. 33.

(a) 3 M. & W. 176.

(b) 3 B. & C. 1. See, also, *Bigg v. Whiskin*, 14 C. B. 195.

16. In *Grover v. Cameron*, 6 U. C. Q. B. (O. S.) 196, where the buyer accepted part and rejected the rest of a lot of goods sold, it was held (one judge dissenting) that the statute barred any action for the residue. But in *Robinson v. Gordon*, 23 U. C. Q. B. 143, and *McNeil v. Keleher*, 15 U. C. C. P. 470, it was held that after part delivery an action would lie either for non-delivery or non-acceptance of the residue. See *Atwood v. Lucas*, 53 Me. 508; *Dyer v. Libby*, 61 Me. 45; *Morse v. Sherman*, 106 Mass. 430.

§ 169. So where there was a verbal contract of sale, by the terms of which the thing was to be resold to the vendor at a fixed price in a particular event, the acceptance by the purchaser in the first instance takes the whole agreement, as an entire contract, out of the statute, and he cannot object, when afterwards sued on the stipulation for the resale, that this contract was not in writing, and that there had been no acceptance nor actual receipt. (c) ^{Bargain for sale and resale.} 17.

§ 170. The effect of the acceptance and actual receipt of the goods, or part of them, is to prove that there was a contract of sale, and this effect is produced, although there may be a dispute between the parties as to the terms of the contract. ^{Effect of the proof of acceptance and receipt.} 18 Such dispute is to be determined on the parol evidence, as all other questions of fact are, by the jury. Where the goods have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptances were to be given, &c. This point may not only be inferred from the decisions already referred to, especially that in *Morton v. Tibbett*, but was expressly decided in *Tomkinson v. Staight*. (d)

The defendant in that case was alleged to have bought a piano from the plaintiff, which was delivered to him at his house, and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiffs. The defendant refused to let the plaintiff take back the piano, and kept it. Held, that the acceptance being fully proven, the statute was satisfied, and that the dispute about the terms of the contract thus proven to exist, was matter of fact for decision by the jury on the parol evidence which was properly let in at the trial. ^{Tomkinson v. Staight.}

(e) *Williams v. Burgess*, 10 A. & E. N. Y. 225. 499.

17. *Wooster v. Sage*, 6 Hun 235, 238; affirmed, 67 N. Y. 67; *White v. Knapp*, 47 Barb. 549; *Fay v. Wheeler*, 44 Vt. 292; *Dickinson v. Dickinson*, 29 Conn. 600. *Contra*, *Hagar v. King*, 38 Barb. 200. But a resale of the goods is within the statute, if not a part of the original contract of sale. *Blanchard v. Trim*, 38

18. *Garfield v. Paris*, 96 U. S. 557, 566; *Danforth v. Walker*, 40 Vt. 257; *Atwood v. Lucas*, 53 Me. 508; *Bass v. Walsh*, 39 Mo. 192, 200; *Schutz v. Bradley*, 4 Daly 29; *Van Woert v. A. & S. R. R.*, 67 N. Y. 539; *McMaster v. Gordon*, 16 U. C. C. P. 16.

(d) 25 L. J., C. P. 85, and 17 C. B. 697.

§ 171. An acceptance by the purchaser can have no effect to satisfy the statute after the vendor has disaffirmed the parol contract.¹⁹ In *Taylor v. Wakefield*,^(e) there was a verbal agreement between the owner of goods and his tenant, who had possession of them, that the latter might purchase them at the expiration of his tenancy, but was not to take them till the money was paid. At the termination of the tenancy, the buyer tendered the price, but the vendor refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the vendor prevented him. *Trover* by the buyer against the vendor. Held, no evidence for the jury of acceptance and delivery, because the vendor had disaffirmed the contract before the buyer took to the goods.

Acceptance
after dis-
affirmance of
the contract
by vendor.

Taylor v.
Wakefield.

SECTION II.—WHAT IS AN ACTUAL RECEIPT.

§ 172. This question is not free from difficulty, nor have the cases always been consistent. The circumstances in which the goods happen to be at the time of the contract afford the basis of a convenient arrangement for reviewing the authorities. The goods sold may be in possession—

1. Of the buyer as bailee or agent of the vendor.
2. Of a third person, whether or not bailee or agent of the vendor.
3. Of the vendor himself, and this is the most usual case.

§ 173. 1. When the goods at the time of the contract are already in possession of the purchaser, it may be difficult to prove actual receipt. But wherever it can be shown that the purchaser has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner.²⁰ The principle is illustrated in the case of *Edan v. Dudfield*.^(f)

Goods already
in possession
of buyer.

19. *Washington Ice Co. v. Webster*, 62 Me. 341, 360; *Brand v. Focht*, 30 How. (N. Y.) Pr. 313; affirmed, 3 Keyes 409. But, after acceptance, the contract cannot be disaffirmed by either party without the other's consent. *Jackson v. Watts*, 1 McCord 288.

(e) 6 E. & B. 765.

20. *Couillard v. Johnson*, 24 Wis. 533, 540. See, also, the following cases of pledge, the principle being the same: *Markham v. Jaudon*, 41 N. Y. 235, 242; *Brown v. Warren*, 43 N. H. 430, 433. See, also, *Beaumont v. Crane*, 14 Mass. 400.

(f) 1 Q. B. 306.

In that case the defendant, agent of plaintiff, had in his possession goods which he had entered at the custom-house in his own name, but which belonged to the plaintiff. He ^{Edan v. Dud-}field. agreed to buy them at a discount on the invoice cost, and afterwards sold them. On action for the price it was strenuously maintained by Sir Fitzroy Kelly, that where the goods exceeding £10 in value, were already in possession of the alleged buyer, there could be no valid sale under the statute of frauds, without a writing; because, although there might be a *virtual*, there could not possibly be an *actual* receipt. But the court, after time to consider, held, that there was evidence to justify the jury in finding an actual receipt, saying, "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (receipt?) And the effect of such acts, necessarily to be proven by parol evidence, must be submitted to a jury."

In *Lillywhite v. Devereux*, (g) the Exchequer Court observed, "No doubt can be entertained after the case of *Edan v. Dud-*field, which was well decided by the Court of Queen's ^{Lillywhite v. Devereux.} Bench, that this is a question of fact for the jury: and that, if it appears that the conduct of a defendant in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds: as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like." In this case, however, the court disagreed with the jury, and set aside their verdict, as not justified by the evidence.

§ 174. 2. When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the

Goods in possession of a third person as bailee for vendor.

purchaser himself. (h) But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor. 21

(h) *Blackburn on Sale* 28.

21. In *Marsh v. Rouse*, 44 N. Y. 643, the plaintiff had bought wine in the possession of the manufacturer, and the next day in the manufacturer's presence resold it to defendant, the manufacturer agreeing to send it to a consignee named by defendant. The defendant soon after refused to take the wine. The court held that the plaintiff could not recover, because the manufacturer had not waived his vendor's lien up to the time of defendant's rejection of the goods. In *Boardman v. Spooner*, 13 Allen 353, 357, the seller gave the buyer an order for goods in a warehouse, but no notice was given to the warehouseman. The court said that notice was essential, and that some well-considered English cases hold that the warehouseman must assent, and cited *Bentall v. Burn and Farina v. Home*, stated in the text. In *Cushing v. Breed*, 14 Allen 376, 380, Chapman, J., said: "If the vendor gives an order on the agents to deliver the property to the vendee and the agents accept the order, and agree with the vendee to store the property for him and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee." See *Townsend v. Hargraves*, 118 Mass. 325, 332; *Tuxworth v. Moore*, 9 Pick. 347; *Legg v. Willard*, 17 Pick. 140; *Hunter v. Wright*, 12 Allen 548; *Hoffman v. Culver*, 7 Bradw. 450, 458;

Williams v. Evans, 39 Mo. 201, 205; *Boewell v. Green*, 25 N. J. L. 390, 399; *Warren v. Milliken*, 57 Me. 97; *Robinson v. Safford*, 57 Id. 163; *King v. Jarman*, 35 Ark. 190; *Phillips v. Ocmulgee Mills*, 55 Ga. 633, 637; *Adoue v. Seeligson*, 54 Tex. 593. In most cases where notice to the bailor of the sale has been held sufficient to consummate it without waiting for his assent, it will be found that the bailee has assented in advance, either expressly or by implication from trade custom, to hold for such person as may buy the goods. See *Salter v. Woollams and Wood v. Manley*, stated in chapter on delivery, Book IV., Part II., *post*. But a distinction must be made between possession by a bailee of the seller and possession by his employee. The possession of the latter is that of the employer. "To make a person a bailee in possession of property sold, so as to require notice to him to complete a delivery, there must be some special trust in respect to the property, imposed upon him, and he must have some interest in, or lien upon it." *Fletcher v. Ingram*, 46 Wis. 191, 202. There cannot be a constructive receipt of goods, sufficient to satisfy the statute, when an actual delivery is legally impossible. In *re Clifford*, 2 Sawyer 428, 432. In this case goods in a bonded warehouse before payment of the duty were sold verbally. The court quotes with approval the above passage in *Benjamin on Sales*, but says

§ 175. In *Bentall v. Burn*, (i) the King's Bench held that a delivery order given to the purchaser of wine did not amount to an actual acceptance (receipt?) by him, until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as agents of the vendee." A distinction was suggested in the case, because the warehousemen were the Dock Company, bound by law to transfer goods from buyer to seller, when required to do so, but the court said: "This may be true, and they might render themselves liable to an action for refusing to do so: but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."

*Bentall v.
Burn.*

§ 176. In *Farina v. Home*, (k) the foregoing case was followed by the Exchequer of Pleas. There the wharfinger gave the vendor a delivery warrant making the goods deliverable to him or to his assignee by endorsement on payment of rent and charges. The vendor forthwith endorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. Held, to be no actual receipt, but sufficient evidence of acceptance to go to the jury.

*Farina v.
Home.*

§ 177. In *Godts v. Rose*, (l) the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer and asked for a cheque for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again,

Godts v. Rose.

that the goods were in the custody of the government. "The officer is in no sense the bailee of the importer, and no attornment by him to a third person by order of the importer can have any effect to change the possession of the goods. * * * To hold otherwise, would involve the absurdity of supposing that there may be a good constructive delivery by means of certain documents, where an actual delivery is legally impossible." Cites Dun-

ham v. Pettee, 1 Daly 112, and other cases.

(i) 3 B. & C. 423. See, also, *Lackington v. Atherton*, 7 M. & G. 360; *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dorrien*, 7 Taunt. 278; *Woodley v. Coventry*, 2 H. & C. 164, 32 L. J., Ex. 185; *Harman v. Anderson*, 2 Camp. 248.

(k) 16 M. & W. 119.

(l) 17 C. B. 229, and 25 L. J., C. P. 61.

but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman: but the purchaser had already got part of the goods, and the warehouseman thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the court held that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a cheque; that the actual receipt therefore had not taken place, the tripartite contract not being complete.

§ 178. But the goods may be lying on the premises of third persons, who are not bailees of them, as timber cut down and lying, at the disposal of the vendor, on the land of the person from whom he bought it, or lying, at his disposal, at a free wharf: and in such cases the delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them, as in the cases of *Tansley v. Turner* (m) and *Cooper v. Bill*, (n) *post*, Book II., Ch. III. 22

[In *Marshall v. Green*, (o) where the buyer of timber growing on land in the possession of the seller's tenant cut down some of the trees, and agreed to sell the tops and stumps to a third person, and the seller afterwards countermanded the sale, before any of the trees had been removed from the land, it was held that there was evidence of actual receipt, as well as of acceptance of a part of the goods within the meaning of the seventeenth section.

From the judgments of Coleridge, C. J., and Brett, J., it would appear that they relied solely upon the early *Nisi Prius* decisions of *Hodgson v. Le Bret* and *Anderson v. Scott* as to marking and acts of ownership which, as we have seen, (*ante* § 166, note (y),) have been practically overruled by the later authorities of *Bill v. Bament* and *Baldey v. Parker*, and *Grove, J.*, at p. 44 of the report, alone, alludes to the true ground upon which it is submitted the decision must rest, viz., that the land was throughout in the possession not of the vendor, but of his tenant.]

(m) 2 Bing. N. C. 151.

(n) 34 L. J., Ex. 161; 3 H. & C. 722.
22. *Thompson v. Baltimore and Ohio R.*
R., 28 Md. 396; *Bass v. Walsh*, 39 Mo.
192; *Yale v. Seeley*, 15 Vt. 221; *Leonard v. Davis*, 1 Black (U. S.) 476, 482;

McNeil v. Keleher, 15 U. C. C. P. 470;
Cotterill v. Stevens, 10 Wis. 422; *Brewster v. Leith*, 1 Minn. 56; *Hallenbeck v. Cochran*, 20 Hun 416.

(o) 1 C. P. D. 35.

§ 179. In America the language of the decisions is, that in such cases there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price," in order to take the contract out of the operation of the statute. *Marsh v. Rouse*, 44 N. Y. 643. ²³

§ 180. 3. Usually at the time of the sale the goods are in possession of the vendor himself, and the dealings of men are so infinitely diversified, circumstances vary so much, and the acts of parties so frequently admit of more than one construction, that it is extremely difficult to point out *a priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the vendee. Of course, if the purchaser remove the goods from the vendor's possession and take them into his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to the *validity* not the *performance* of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase, (*p*) is an actual receipt sufficient to make the contract good, although a serious question may and often does arise at a later period, whether there has been an actual receipt of the bulk.

§ 181. It is well settled that the delivery of goods to a common carrier, *a fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose. (*q*)

It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not *accepting*, the goods. (*r*)

23. See this case stated in note 21, *supra*. W. 277, *Meredit v. Meigh*, 2 E. & B. 364, and 22 L. J., Q. B. 401; *Cusack v.*

(*p*) *Klinitz v. Surry*, 5 Esp. 266.

(*q*) *Dawes v. Peck*, 8 T. R. 330; *Waite v. Baker*, 2 Ex. 1; *Fragano v. Long*, 4 B. & C. 219; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Johnson v. Dodgson*, 2 M. & W. 653; *Norman v. Phillips*, 14 M. &

Robinson, 1 B. & S. 299, and 30 L. J., Q. B. 261; *Hart v. Bush*, E., B. & E. 494, and 27 L. J., Q. B. 271; *Smith v. Hudson*, 34 L. J., Q. B. 145; 4 B. & S. 431.

(*r*) *Supra*, § 161.

Decisions in
America.

The law in the United States is the same. *Cross v. O'Donnell*, 44 N. Y. 661; *Caulkins v. Hellmann*, 47 N.

Y. 449. 24

§ 182. It is also now finally determined, that the goods may remain in the possession of the vendor, *if he assume a changed character*, and yet be actually received by the vendee.

Vendor may
become bailee
of purchaser.

It may be agreed that the vendor shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the vendor into that of the vendee through his agent. 25

24. "A delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to the purchaser himself" *Hunter v. Wright*, 12 Allen 548, 550; *Hall v. Richardson*, 16 Md. 396; *Magruder v. Gage*, 33 Md. 344; *Allard v. Greasert*, 61 N. Y. 1. In *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 20, *Rapallo, J.*, said: "A delivery to a carrier pursuant to the direction of the purchaser is a good delivery to him. Though not sufficient to constitute an acceptance under the statute of frauds, it is sufficient to constitute a delivery." In *Spencer v. Hale*, 30 Vt. 314, and *Strong v. Dodda*, 47 Vt. 348, 356, held that a carrier designated by the buyer is his agent both to receive and to accept.

25. *Gibson v. Stevens*, 8 How. 384. In *Weld v. Came*, 98 Mass. 152, 154, the seller agreed to store the article purchased. *Chapman, J.*, said: "An agreement of the vendor to hold the goods sold in storage for the vendee, is equivalent to a delivery." See *Barrett v. Goddard*, 3 Mason 107; *Beecher v. Wayall*, 16 Gray 376; *Ex parte Safford*, 2 Low. 565; *Knight v. Mann*, 118 Mass. 147; *Safford v. McDonough*, 120 Mass. 290; *Rodgers v. Jones*, 129 Mass. 420, 422. In this last case, *Gray, C. J.*, said that to constitute an acceptance and receipt of goods under the statute of frauds, the buyer "must have assumed the legal possession of them, either by taking them

into the custody or control of himself, or of his authorized agent, or by making the seller or a third person his bailee, to hold them for him, so as to terminate the seller's possession of the goods, and lien for their price." *Boynton v. Veazie*, 24 Me. 286; *Waldron v. Chase*, 37 Me. 414; *Means v. Williamson*, 37 Id. 556; *Godchaux v. Mulford*, 26 Cal. 316; *Walker v. Boulton*, 3 U. C. Q. B. (O. S.) 252; *Rapley v. Adey*, 65 Barb. 589; *Wylie v. Kelly*, 41 Id. 594, 598. In *Green v. Merriam*, 28 Vt. 801, the buyer of sheep at auction asked and obtained leave to put them in a yard of the seller, promising to come and get them and pay all bills on a certain day, but on that day declined to take them. *Bennett, J.*, said: "The vendor became the bailee of the vendee, and his possession, by means of the agreement, became the possession of the vendee, and the sheep were at his risk and to be maintained at his expense." And it was held that there was such delivery of the sheep as to take the case out of the statute. In *Janvrin v. Maxwell*, 23 Wis. 51, the same principle is held, though with reluctance. *Paine, J.*, said: "Parties contract, without writing, for the sale of goods exceeding \$50 in value. There is no payment and no delivery. The contract is void by the statute. But the vendor says to the vendee, 'I deliver the goods,' and the latter replies, 'I accept them, and desire you to

The first case was that of *Chaplin v. Rogers*, (s) in 1800, where a stack of hay remaining on the vendor's premises was held to have been actually received by the purchaser, on the ground that he had resold part of it to a sub-vendee, who had taken away the part so purchased by him.

*Chaplin v.
Rogers.*

store them for me as my bailee,' and the contract is good! * * * Yet it is true that if such delivery and acceptance are actually made, it satisfies the letter of the statute.

Mere words cannot constitute the seller bailee.—In New York, however, it is held on the authority of *Shindler v. Houston*, 1 N. Y. 261, and other cases, (see note 1, *supra*), that mere words cannot constitute a sale within the statute, and therefore it seems that mere words cannot establish a bailment to validate such sale; though the question seems never to have been adjudicated directly in that state. See *Ely v. Ormsby*, 12 Barb. 570; *Hallenbeck v. Cochran*, 20 Hun 416. In Missouri, on the authority of *Shindler v. Houston*, *supra*, it has been held that a mere verbal agreement, constituting the seller bailee for the buyer, will not satisfy the statute. *Kirby v. Johnson*, 22 Mo. 354. *Ryland, J.*, says that *Elmore v. Stone* is not now law, (citing *Best, J.*, in *Proctor v. Jones*, 2 Carr. & P. 532,) and that in *Chaplin v. Rogers*, 1 East 192, and *Vincent v. Germonds*, 11 Johns. 284, there were acts of delivery, and concludes: "If the courts should decide that such facts are sufficient to take the case out of the statute of frauds, then it is difficult to find what will come within that statute. Nay, we had better blot the statute from our books at once, and not fritter away its vitality by constructive deliveries and acceptances." A similar conclusion was reached in *Malone v. Plato*, 22 Cal. 103. In this case horses were offered for \$2200, and, after trial, the

buyer returning to the stable of the seller, said: "Put them in the stable; do not let them; I will take them; I will be back in half an hour and pay for them."

On this a suit for non-acceptance was commenced. The court said that *Elmore v. Stone* was a doubtful case, sustained only on the ground that the seller having, at the buyer's request, removed the horse brought from his sale stable to his livery stable, had by an act changed his possession from that of owner to that of livery stable keeper. And it was held (citing *Shindler v. Houston*) that the case before the court included no act, and that mere words could never satisfy the statute." In *Bowers v. Anderson*, 49 Ga. 143, cotton was sold, to remain at the seller's gin-house free of storage, at the buyer's risk until hauled away by him; and the buyer proceeded to insure. The seller repudiated the sale. On a suit for damages, *Trippe, J.*, said: "It has been often stated as being now finally determined, that the goods may remain in the possession of the seller, if he assumes a changed character, and yet be actually received by the buyer; that it may be agreed that the seller shall cease to hold as owner, and shall assume the character of bailee or agent for purchaser, thus converting the possession of the seller into that of the buyer, through his agent. This is so laid down by Mr Benjamin in his work on Sales. On examining the cases referred to, it will be found that there was something in nearly every one besides the mere verbal agreement of the parties that the seller should assume a

(s) 1 East 195, referred to with approval by Coleridge, C. J., in *Marshall v.*

Green, 1 C. P. D. at p. 41.

§ 183. But the case usually cited as the leading one on this point is *Elmore v. Stone*, (t) where the purchaser of horses from a dealer, left them with the dealer to be kept at livery for him, the purchaser. Sir James Mansfield delivered the judgment of the Common Bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held not as owner, but as any other livery-stable keeper might have done. 26

§ 184. Nearly half a century later, in 1856, the case of *Marvin v. Wallis*, (u) on facts almost identical with those in *Elmore v. Stone*, was decided by the Queen's Bench on the authority of the latter. The facts as found by the jury were that after the completion of the bargain, the vendor borrowed the horse for a short time, and, with the purchaser's assent, retained it as a borrowed horse. Held, that there had been an actual receipt by vendee; that there had been a *change of character* in the vendor, from owner to bailee and agent of the purchaser. The Bench on this occasion was composed of Campbell, C. J., and Coleridge and Erle, JJ.

So in *Beaumont v. Brengeri*, (v) the carriage bought by the defendant remained in the shop of the plaintiff the vendor, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for account of the vendee. Held, an actual receipt. 27

§ 185. Two cases decided in the King's Bench, in 1820 and 1821, changed character. There was an *act* performed by one or the other of the parties, or by both, which formed a marked feature in the transaction." Distinguishes the English cases cited in the text, and cites and follows *Shindler v. Houston*, *supra*. As to this case of *Bowers v. Anderson*, it must be observed that the *seller* avoided the sale. The buyer having insured the property would no doubt have been held bound by reason of that act of ownership. In the well-considered case of *Matthiessen, &c., Co. v. McMahon*, 38 N. J. L. 536, 541, the same principle is supported, and the two cases cited by our author in § 184 were explained as involving acts of ownership. *Cusack v. Robinson* is quoted as sustaining this explanation. (t) 1 Taunt. 458. 26. *Elmore v. Stone* is approved by Lowell, J., in *Ex parte Safford*, 2 Low. 565, who says that it was approved by Shaw, C. J., in *Arnold v. Delano*, 4 Cush. 90. But see *Malone v. Plato*, *Kirby v. Johnson* and *Bowers v. Anderson*, stated in last note, *supra*. (u) 6 E. & B. 726; 25 L. J., Q. B. 369. (v) 5 C. B. 301. 27. *Marvin v. Wallis* and *Beaumont v. Brengeri* are explained in *Matthiessen, &c., Co. v. McMahon*, 38 N. J. L. 541, and *Cusack v. Robinson* is quoted and approved.

may seem at first sight to trench upon the doctrine established in *Elmore v. Stone* and *Marvin v. Wallis*. In the first, *Tempest v. Fitzgerald*,^(x) the purchaser of a horse agreed, in August, to give forty-five guineas for it and to take it away in September. *The parties understood it to be a ready-money bargain.* The purchaser returned on the 20th September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plaintiff's son to keep it for another week, which was assented to as a favor. The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. Held, that there was no actual receipt. The ground of the decision was that defendant had no right of property in the horse *until the price was paid*; that if he had gone away with the horse vendor might have maintained trover; and the case was distinguished by the judges from *Chaplin v. Rogers*,^(y) and *Blenkinsop v. Clayton*,^(z) on this basis. In the second case, *Carter v. Toussaint*,^(a) the plaintiffs, who were farriers, sold defendant a racehorse which required firing, and this was done in defendant's presence and with his approbation. It was agreed that the horse should be kept by plaintiffs for twenty days without charge. At the end of that time, by defendant's orders, the horse was taken by plaintiffs to a park to be turned out to grass. It was entered in plaintiff's name, and this was also done by the direction of defendant, who was anxious that it should not be known that he kept a racehorse. *No time was specified in the bargain for the payment of the price.* Held, that there had been no actual receipt, because the seller was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of defendant and by his request, that would have amounted to an actual receipt of it by the purchaser; but on the facts the purchaser could not have maintained trover against the park-keeper on tendering the keep.

It is apparent, from the reasoning of the judges in both the above cases, that there is nothing irreconcilable between the principles on which they were decided and those which had been sanctioned in the

(x) 8 B. & Ald. 680.

(y) 1 East 192.

(z) 7 Taunt. 597.

(a) 5 B. & Ald. 855.

cases previously quoted. Both these cases went distinctly upon the ground that in a cash sale the vendor has a right to demand payment of the price concurrently with delivery of possession; and that as nothing had been assented to by the vendors which impaired this right, there has been no actual receipt by the vendees. (b) 28

§ 186. In *Cusack v. Robinson*, (c) the court treated the rule as settled that "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute."

The subject was very thoroughly discussed in *Castle v. Swarder*, (d) in which an unanimous decision of the Exchequer of Pleas, composed of Martin, Channell and Bramwell, BB., was reversed by a decision, also unanimous, of the Exchequer Chamber, composed of Cockburn, C. J., and Crompton, J., of the Queen's Bench, and Willes, Byles and Keating, JJ., of the Common Pleas.

This was an action to recover £80 2s. 2d., the price of some rum and brandy, for which the defendant gave a verbal order at a price agreed on, *with six months' credit*. The plaintiff's clerk wrote off, and transferred into the defendant's name, in the books kept in plaintiff's bonded warehouse, two specific puncheons of rum and a hogshead of brandy, marked, and described in an invoice sent by post to defendant. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the custom-house officers another. This was the usual mode of selling in bond in Bristol, where plaintiffs were carrying on business as spirit merchants. An invoice, describing the marks of the packages, the ships by which they had been imported, and the contents, was enclosed to defendant in a letter, saying: "The above remain in bond, and which you will find of a very good quality, and hope will merit the continuance of your favors." After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked plaintiff's traveler to sell the goods for him. He was referred to plaintiffs, and wrote to them, saying:

(b) See, also, *Holmes v. Hoskins*, 9 Ex. 753.

(c) 30 L. J., Q. B. 264; 1 B. & S. 299.

(d) 29 L. J., Ex. 235; 30 L. J. Ex.

28. *Safford v. McDonough*, 120 Mass. 290, and 6 H. & N. 832.

"You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it."

On these facts, Bramwell, B., directed a non-suit, with leave to plaintiff to move, the defendant having objected that there was no delivery nor acceptance to satisfy the statute of frauds. Held, by the Court of Exchequer, that there had been no delivery nor actual receipt; that as the goods remained under control of the vendor, and in his possession till after the credit had expired, his lien had revived; and that in the interval while the credit was running, there had been nothing done to constitute actual receipt by the purchaser.

On the appeal to the Exchequer Chamber, Cockburn, C. J., in giving his opinion said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises, whether the possession which actually remained in the sellers, was a possession in the sellers *by virtue of their original property in the goods, or whether it had become a possession as agents and bailees of the buyers.*" The learned Chief Justice then went on to point out that there was sufficient evidence of a change of character in the possession to go to the jury, in the facts proven, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and failing in that request, in asking the plaintiffs to sell the goods for him."

Crompton, J., pointed out that the court did not differ from the Court of Exchequer save on one point, namely, that "there was some evidence that the character of plaintiffs was changed to that of warehousemen," and said that "according to the authorities there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own."

§ 187. It will already have been perceived that in many of the cases, the test for determining whether there has been an actual receipt by the purchaser, has been to inquire whether the vendor has lost his lien. (e) Receipt implies delivery, (f) and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by Holroyd, J., in his decision in *Baldey v.*

Actual receipt
tested by loss
of vendor's
lien.

(e) See *post*, Book V., Part I., ch. IV.,
on Lien of Vendor.

(f) Per Parke, B., in *Saunders v. Topp*
4 Ex. 394.

Parker: (g) "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." No exception is known in the whole series of decisions to the propositions here enunciated, and it is safe to assume as a general rule, that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note. (h) 29

§ 188. It may be useful here to advert to one case in which the circumstances were very peculiar.

In *Dodsley v. Varley*, (i) wool was bought by the defendant from the plaintiff. The price was agreed on, but the wool would have to be weighed. It was sent to the warehouse of a person employed by the defendant, was weighed, and packed up with other wools in sheeting provided by the defendant. It was the usual course for the wool to remain at this warehouse till paid for, and this wool had not been paid for. The defendant insisted that the vendor's lien remained, and that the wool therefore had not been actually received by him as purchaser. But the court held that the property had passed, that the goods had been delivered, and were at the

(g) 2 B. & C. 37.

(h) *Howe v. Palmer*, 3 B. & Ald. 321; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald. 855; *Baldey v. Parker*, 2 B. & C. 67; *Smith v. Surman*, 9 B. & C. 561; *Bill v. Bament*, 9 M. & W. 37; *Phillips v. Bistolli*, 2 B. & C. 511; *Hawes v. Watson*, 2 B. & C. 540; *Maberley v. Sheppard*, 10 Bing. 101; *Holmes v. Hoskins*, 9 Ex. 753; *Cusack v. Robinson*, 30 L. J., Q. B. 264; *Castle v. Swarder*, 29 L. J., Ex. 235; 8 C., 30 L. J., Ex. 310, and 6 H. & N. 832; *Morton v. Tibbett*, 15 Q. B. 423, and 19 L. J., Q. B. 382.

29. *Safford v. McDonough*, 120 Mass. 290; *Dodge v. Morse*, 129 Mass. 420, 422; *Ex parte Safford*, 2 Low. 563, 565; Gar-

det v. Belknap, 1 Cal. 399; *Green v. Merriam*, 28 Vt. 801; *Marsh v. Rouse*, 44 N. Y. 643; *Maxwell v. Brown*, 39 Me. 98, 103. Judge Wright, in *Shindler v. Houston*, 1 N. Y. 269, says: "The best-considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor." This is quoted and approved in *Stone v. Browning*, 51 N. Y. 211, 215. But in *Wegg v. Drake*, 16 U. C. Q. B. 252, it was held that whether or not the vendor had parted with his lien was not the test to determine whether there had been a receipt by the buyer to satisfy the statute.

(i) 12 Ad. & E. 632.

risk of the purchaser. In relation to the vendor's right, the court said: "The plaintiff had not what is called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment." It is plain that there is nothing in this case which conflicts with the rule, that there can be no actual receipt by purchaser while vendor's lien continues, for the court held that the lien was gone.³⁰ It may, however, be remarked, that the effect attributed by the court to the special agreement, that the goods should remain in the defendant's warehouse without removal till paid for, is much greater than was accorded to a similar stipulation, in the case of *Howes v. Ball*, (*k*) where the question *Howes v. Ball.* was raised in a more direct form than in *Dodsley v. Varley*. In this last-mentioned case, where the litigation was between the vendor and the administrator of the deceased purchaser, the court held that the property had passed in the thing sold, and that the special stipulation between the parties might, perhaps, amount to a personal license in favor of the vendor to retake the thing sold, if not paid for at the expiration of the credit allowed; but that such license could not be available against a transferee of the thing, as a sub-vendee, or the administrator of the vendee.

30. See *Pinkham v. Mattox*, 53 N. H. and follows it.
600, which resembles *Dodsley v. Varley*, (*k*) 7 B. & C. 484.

CHAPTER V.

OF EARNEST OR PART PAYMENT.

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§ 189. The giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the statute, "giving something in earnest" and "giving something in part payment," are often treated as meaning the same thing, although the language clearly intimates that the earnest is "*something*" that "binds the bargain," whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed.¹ Earnest may be money, or some gift or token (among the Romans usually a ring,) given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England. (a)

Examples are found in *Bach v. Owen*, (b) in 1793, and *Goodall v.*

1. In *Noakes v. Morey*, 30 Ind. 103, 110, it was held that a check delivered as a forfeiture in case of non-performance, was neither part payment nor earnest. The same question arose in *Howe v. Hayward*, 108 Mass. 54. It was admitted that the check was not part payment, but it was claimed that it amounted to earnest. Chapman, C. J., said: "The idea of earnest in connection with contracts was taken from the civil law. It is not necessary to consider its precise effect under that law. As used in the statute of

frauds, earnest is regarded as part payment of the price." In *Krohn v. Bantz*, 68 Ind. 277, Worden, J., cites *Howe v. Hayward* and Benjamin on Sales, and says. "Conceding that earnest may be something distinct from part payment, it is quite clear that it must have some value." And it was held that the buyer's own note for the price was of no value as earnest or part payment, being void for want of consideration.

(a) Bracton 1, 2, c. 27.

(b) 5 T. R. 409.

Skelton, (c) in 1794, in the former of which a half-penny, and in the latter a shilling, was given in earnest of the bargain.

§ 190. Whether giving earnest has the effect of passing the property in the thing sold from vendor to vendee will be considered in a subsequent part of this treatise, (d) but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The giving of earnest, and the part payment of the price, are two facts independent of the bargain, capable of proof by parol, and the framers of the statute have said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing.

Either suffices to make the contract good.

§ 191. The former of these facts, that of giving something in earnest to "bind the bargain," has been the subject of only one reported case, that of *Blenkinsop v. Clayton*, (e) in which the buyer drew a shilling across the vendor's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to the vendor, the court necessarily held that the statute had not been satisfied.

Something must be actually given to constitute earnest.

Blenkinsop v. Clayton.

There is another case, (f) in which the plaintiff was nonsuited in an action on a contract of sale, where a shilling earnest money was actually given by the buyer to bind the bargain, but the case turned entirely on the form of action, which was for goods *sold and delivered*, under circumstances where the court was of opinion that there had been no delivery. A count for goods bargained and sold would no doubt have been sustained.

Goodall v. Skelton.

§ 192. On the subject of part payment, there is but one important decision under this clause of the statute; but the cases which have arisen under analogous clauses in the statutes of limitations and the bankruptcy acts may be considered with advantage in this connection.

Part payment.

An agreement for the purchase of goods exceeding £10 in value, was made with the understanding, and as part of the contract, that the vendor should deduct from the price the amount of a debt previously due by him to the purchaser.

Agreement to set off a debt due to the buyer.

(c) 2 H. Bl. 316.

(d) *Post*, Book II., ch. IV.

(e) 7 Taunt. 597.

(f) *Goodall v. Skelton*, 2 H. Bl. 316.

The vendor then sent the goods to the purchaser with an invoice charging him with the price £20 18s. 11d., under which was written, "By your account against me, £4 14s. 11d." The purchaser returned the goods as inferior to sample. It was contended, on behalf of the vendor, who brought an action for goods sold and delivered, that this credit of £4 14s. 11d. was a part payment of the price of the goods, sufficient to take the case out of the statute. Held, not to be so. Platt, B., said, "You rely on part of the contract itself, as being part performance of it." Pollock, C. B., said, "Here was nothing but one contract, whereas the statute requires a contract, and if it be not in writing, something besides." Parke, B., said, "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part payment then or subsequently." Alderson, B., said, "The seventeenth section of the statute of frauds implies that to bind a buyer of goods of £10 value without writing he must have done *two* things—first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment." (g)

From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the statute, if made subsequently to the sale, or by an *independent* contract at the time of the sale, such as the giving of a receipt by the buyer for the debt previously due to him, but the decision is express on the point that such an agreement, when part of the bargain for the purchase, one of the terms of the contract of sale itself, is not such a part payment as is required to make a *parol* sale valid for an amount exceeding £10.²

(g) Walker v. Nussey, 16 M. & W. 302. *ject will be found in the case of Matthias-*
 2. Payment by credit on existing *sen, & Co. v. McMahon*, 38 N. J. L.
debt.—A very full discussion of this sub- 536, in the N. J. Court of Errors and

§ 193. Under the statute of limitations, it has been held that where goods are supplied by agreement "on account" of a debt, this is part payment of the debt. The decision to this effect given by the Exchequer in *Hart v. Nash*, (h) was followed by the Queen's Bench in *Hooper v. Stephens*. (i) And the decisions under the bankruptcy acts have been to the same effect. (k)

Analogous
decisions
under statute
of limitations.

Goods "on
account" of a
debt.

Appears. In that case the buyer claimed title to certain goods by virtue of an oral purchase in satisfaction of a certain indebtedness of the seller to the buyer. Depue, J., said that the question was "whether an agreement in parol by the seller to sell, and the buyer to buy goods to the value of an existing debt, and thereby satisfy and pay the debt, is a valid sale within the statute, though there be no delivery of the goods, and no receipt or voucher be given as evidence of the discharge of the indebtedness. The charge of the judge was in accordance with the decision of the Court of Exchequer in *Walker v. Nussey*, 16 M. & W. 302. * * * *Walker v. Nussey* has been adopted without dissent in the text-books. Benjamin and Story on Sales and Chitty and Parsons on Contracts. Substantially the same doctrine was held by the Supreme Court of New York in a case earlier in point of time, *Artcher v. Zeh*, 5 Hill 200, and it has been reaffirmed in cases decided since. *Ely v. Ormsby*, 12 Barb. 570; *Clark v. Tucker*, 2 Sandf. Sup. Ct. 157; *Brabin v. Hyde*, 32 N. Y. 519; *Teed v. Teed*, 44 Barb. 96; *Mattice v. Allen*, 3 Keyes 492; *Walruth v. Ritchie*, 5 Lans. 362. * * * An effort was made to distinguish this case from the cases cited, in the fact that, in some of them at least, the agreement that the debt should be paid by the goods sold was not wholly *in present*, and it was contemplated by the parties that something should be done in the future, such

as a credit entered, or endorsement made; whereas, in the present case, the testimony showed that the agreement was, that the goods sold should operate at once as payment without qualification or contingency. In *Dow v. Worthen*, 37 Vt. 108, observations to this effect were made upon *Walker v. Nussey*. I see no efficacy in this distinction. The principle which underlies the cases cited, and on which they rest, is that *where no written evidence of the contract is made, and payment is relied on as the compliance with the statute, mere words are not sufficient; some act in part performance or part execution of the contract, such as the surrender or cancellation of the evidence of the debt, or a receipt or discharge of the indebtedness, is necessary to make the contract valid.* * * * I concur in the observations of Gardner, J., that 'the acts of part payment, of delivery and acceptance mentioned in the statute, are something over and beyond the agreement of which they are part performances, and which they assume as already in existence.' *Shindler v. Houston*, 1 N. Y. 264." To the New York cases cited by Justice Depue we may add *Wylie v. Kelly*, 41 Barb. 594; *Brand v. Brand*, 49 Barb. 346; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6, 27. In *Mattice v. Allen*, 3 Keyes 493, Grover J., said: "The counsel for the respondent insists that the agreement of the parties to apply the debt in payment discharges the debt, and therefore it must be regarded as a payment upon the contract,

(h) 2 Cr., M. & R. 337.

(i) 4 Ad. & E. 71.

(k) *Wilkins v. Casey*, 7 T. R. 713; *Cannan v. Wood*, 2 M. & W. 465.

So, also, in *Blair v. Ormond*,⁽¹⁾ it was held, under the statute of limitations, that an agreement by the debtor to board and lodge the creditor at a fixed price per week in deduction of the debt, was a part payment constituting a sufficient acknowledgment of the debt to take it out of the statute.

Blair v. Ormond.

Board and lodging supplied in part payment.

and cites *Davis v. Spencer*, 24 N. Y. 386, in support of the position. It is true that when mutual debts exist, an agreement by the parties to apply the same in satisfaction of each other, will operate as a satisfaction of both. But that doctrine has no application to the present case, for the reason that the statute makes void the entire agreement, when there was nothing but mere words." See *Brown v. Wade*, 42 Iowa 647, 651; *Cotterill v. Stevens*, 10 Wis. 442.

Payment Subsequent to the Oral Agreement.—Payment on the contract of sale will suffice to validate it, though made subsequently, under the English statute. *Marsh v. Hyde*, 3 Gray 331; *Thompson v. Alger*, 12 Metc. 428; *Townsend v. Hargraves*, 118 Mass. 325; *Gault v. Brown*, 48 N. H. 183, 189; *Brady v. Harrahy*, 21 U. C. Q. B. 340. But it must be made to appear that the part payment refers to and is in execution of the contract. See *Matthiessen, &c., Co. v. McDonald*, 38 N. J. L. 536, 538, stated *ante* § 140, note 2; *Organ v. Stewart*, 60 N. Y. 413. The New York statute of frauds expressly provides that the part payment must be at the time of making the contract to satisfy the statute, and the Wisconsin statute contains the same provision. Several decisions have been made in each state interpreting these words. In *Bissell v. Balcom*, 39 N. Y. 275, 282, a contract of sale of vendor's cattle was made, and the next day the buyer paid a small sum to the seller, who asked for it, saying, "it is best that we bind the bargain so that there will be no chance to

back out." Woodruff, J., said: "Here is a distinct, intelligent reference by both parties to the negotiation of the previous day; a recognition of its want of validity; a declared intent to make the bargain valid and binding, assented to; a request for the payment of the money for that purpose, and a payment in compliance with that request." "Before that time there had been treaty and words of agreement, but having no legal force. Now by plain reference, though not by recital, the agreement is re-enacted." The sale was therefore sustained as having been made at the time of the payment. See *Thompson v. Alger*, 12 Metc. 428, which was upon the New York act; *McKnight v. Dunlop*, 5 N. Y. 537; *Allis v. Read*, 45 N. Y. 142; *Hawley v. Keeler*, 53 N. Y. 114, 120. In *Hunter v. Wetsell*, 57 N. Y. 375, 377, Earl, C., said: "The contract was made September 27th, 1867, and no portion of the price was then paid. Subsequently the defendants paid the plaintiff \$300 upon the price. There is no proof of what was said about the hops or the contract when these payments were made. The evidence does not even show that the contract was mentioned or referred to. It is simply that the payments were made toward the hops." The court shows the distinction between the English and the New York statute, and says that the sale in question is not established. "The following points may be regarded as established: (1) When a contract of sale has been made, good at common law, but void under the statute of frauds, and the parties subsequently meet, and for the

(1) 17 Q. B. 423, and 20 L. J., Q. B. 444.

194. There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that any thing of value which by mutual agreement is given by the buyer and accepted by the seller "on account" or in part satisfaction of the price will be equivalent to part payment.³ The transfer to the vendor

Bill or note
transferred
in part pay-
ment.

express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. (2) Where, in case of such a void contract, the parties subsequently come together and substantially restate, re-affirm or renew its terms, so as then and there, by the meeting of their minds to make a contract, and there payment is made upon the contract, the statute is complied with." After a new trial the same case came again before the New York Court of Appeals. *Hunter v. Wet-sell*, 84 N. Y. 549. On the new trial there was evidence, and the jury found that the contract was restated at the time of the partial payment, and their verdict was sustained. The defendant raised a new question, showing that the payment was by check, and claiming that the part payment was not made until the check was paid at the bank, and the sale was not then recognized; but the court said that the delivery of the check was such an act of part payment as satisfied the statute. See *Hallenbeck v. Cochran*, 20 Hun 416, where the sale was held void, although at the time of the part payment the buyer referred to the bargain, saying that he "had a hard bargain." This is not easily reconciled with *Bissell v. Balcom*, *supra*. In *Bates v. Chesebro*, 82 Wis. 594, a payment subsequent to the contract of sale was held insufficient. *Cole, J.*, said: "It must appear that the parties understood and assented to the terms of the contract at the time of payment, so as to make

such payment apply on a present and not a past agreement of sale." This was cited and followed in *Paine v. Fulton*, 34 Wis. 83, where the part payment was made, subsequently to the oral sale, to a third person at the request of the seller.

Payment must be Accepted to be Effectual to Satisfy the Statute.—*Edgerton v. Hodge*, 41 Vt. 676; *Kaitling v. Parkin*, 23 U. C. C. P. 569; *Walrath v. Ingles*, 64 Barb. 265. When made and accepted, both parties are bound. *Furniss v. Sawens*, 3 U. C. Q. B. 77; *White v. Allen*, 9 Ind. 561. Payment to an agent, or to a third person by direction of the seller, is sufficient to satisfy the statute, but the agent must be authorized, or his receipt ratified by some act of his principal. *Hawley v. Keeler*, 53 N. Y. 114, 120; *Brady v. Harrahy*, 21 U. C. Q. B. 340; *Cotterill v. Stevens*, 10 Wis. 442.

3. The earnest or part payment required by the statute is not necessarily money. In *White v. Drew*, 56 How. Pr. 53, 57, the plaintiff gave the defendant information showing that a rise in certain stock was probable, in consideration for which defendant agreed to hold five thousand shares already in his possession for plaintiff's account. A profit having been realized plaintiff claimed the benefit of it, but defendant disputed this claim under the statute of frauds. *Pratt, J.*, said: "The knowledge of a fact cannot be called mere words. * * * This information was concededly of great value and was just as effective to take the case out of the statute of frauds as if a cash payment had then been made."

of a bill or note "on account" or in part payment, would seem also to suffice to render the bargain valid. (m) ⁴

In *Maber v. Maber*, (n) a gift of the interest due was held to be a part payment.

§ 195. The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood unless careful discrimination be observed. Earnest was of two kinds: one was an independent contract anterior to the agreement of sale; the other was accessory to the contract of sale after it had been agreed on, and was, like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractus facti*.

§ 196. The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. If the sale afterwards took place, the earnest money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest

(m) *Chamberlyn v. Delarive*, 2 Wils. 253; *Kearlake v. Morgan*, 5 T. R. 513; *Griffiths v. Owen*, 13 M. & W. 58.

4. Giving the Buyer's own Note for the Price is not Payment.—In *Krohn v. Bantz*, 68 Ind. 277, the buyer complained for breach of an oral contract of sale of two hundred and fifty hogs, on account of which he had given his note for \$100. The seller demurred. Worden, J., said: "The note, we think, cannot be regarded as part payment within the meaning of the statute. It was but the plaintiff's agreement to pay in the future a part of the purchase money for the hogs before the arrival of the time for their delivery. It was no more effective for the purpose of taking the contract out of the statute as part payment, than would have been the plaintiff's parol promise to do the same thing." "The note was of no value whatever, because it had no consideration to support it, and its payment could not therefore have been enforced. * * *

The promise of one party may be a good

consideration for the promise of the other. But if the promise of one is not valid and binding, because not made in accordance with the requirements of law, it can furnish no valid consideration for the promise of the other. The element of mutuality is entirely lacking in such case." To the same effect, see *Hooker v. Knab*, 26 Wis. 511; *Nichols v. Mitchell*, 30 Wis. 329; *Combs v. Bateman*, 10 Barb. 573. See, also, *Scott v. Bush*, 26 Mich. 418; *Grimes v. Van Vechten*, 20 Mich. 410. Payment by check, which is honored, is considered payment at the time it is given. *Hunter v. Wetsell*, 84 N. Y. 549; *Gould v. Town of Oneonta*, 71 N. Y. 298, 307. A payment of the price was held to satisfy the statute, notwithstanding the fact that the seller gave back to the buyer a note for the money received. The court said they would treat the note as a receipt for the money. *Smith v. Rowley*, 84 N. Y. 367.

(n) L. R., 2 Ex. 153.

money and an equivalent amount by way of forfeiture for disappointing the other in his option. (o)

§ 197. The other species of earnest of the Roman law was the same as that of the common law. It might consist of a thing, as a ring, *annullus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the conclusion of the bargain (p)—and when money was given in earnest it was considered as being in part payment of the price. (q) Varro gives this as the etymology of the word: (r) “*Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum a Græco arrabon, reliquum, ex eo quod debitum reliquit;*”—and the Institutes of Gaius (s) give its true nature, “*Quod sæpe arræ nomine pro emptione datur, non eo pertinet quasi sine arra conventio nihil proficiat; sed ut evidentius probari possit convenisse de pretio.*”

§ 198. At a latter date, however, the Emperor Justinian made by statute an important change in the law of earnest, by providing that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest money. The whole text is a remarkable one, giving full rules as to form of the sale, the assent, the giving of earnest, and the right of rescission. “*Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit; nam quod arræ nomine datur argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus quæ sine scriptura consistunt obtinere oportet, nam nihil a nobis in hujusmodi venditionibus innovatum est. In his autem quæ scriptura conficiuntur, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahentibus autem subscripta; et si per tabelliones fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor, sine pœna recedere ab emptione. Ita tamen impune eis recedere concedimus, nisi jam arrarum nomine aliquid*

(o) L. 17, Cod. de Fid. Instr.; Pothier, *Vente*, Nos. 497, 8, 9.

(p) Dig. 19, 1, de Act. Emp. et Vend. 11, § 6, Ulp.

(q) Dig. 18, 3, de Lege Commissoria, 8 Scæv.

(r) De Lingua Latina, lib. 5, § 175.

The Greek ἀρραβών and the Latin arra are both modifications of the Hebrew 'érábôn, a pledge, Gen. xxxviii. 17. This word was introduced by the Phœnicians into both Greece and Italy. See Skeat's *Etym. Dict.*, p. 184.

(s) Com. 3, § 139.

fuert datum. Hoc etenim subsecuto, sive in scriptis, sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arris nihil expressum est." (t) This text not only changed the antecedent law, by allowing either party to rescind the bargain by forfeiting the value of the earnest, but it made a further innovation by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been finally completed; in derogation of the ante-Justinian law, which made the contract perfect by mutual assent before the writings were drawn up. (u)

§ 199. Pothier struggles, on the authority of Vinnius, to escape from the apparently plain meaning of this text of the Institutes, and maintains the old distinction, that after earnest given to bind the bargain, neither party can escape from his obligations as vendor or purchaser, by the sacrifice of the amount of the earnest. (x) But his reasoning is scarcely satisfactory, and later authors consider the language of the text too absolute to be explained away. (y)

§ 200. The French civil code seems to reject Pothier's doctrine and provides, art. 1590, "*Si la promesse de vente a été faite avec des arrhes, chacun des contractants est maître de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double.*" Singularly enough, however, the same discussion has sprung up under this text as under that of Justinian, and the commentators are divided, Toullier, Maleville, Duranton, and some others taking the side of Pothier, while Duvergier, Coulon, Devilleneuve, and Ortolan, are of the contrary opinion. (z)

(t) Inst. lib. iii., tit. xxiii., 1.

(u) Dig. 18, 1, de Contrah. Empt. 2, § 1, Paul; Gaius, Comm. 3, § 139.

(x) Pothier, Vente, No. 508.

(y) Ortolan, Explication Hist. des Inst. vol. 3, p. 269.

(z) The references are given in Sirey & Gilbert, Code Annoté, art. 1590.

CHAPTER VI.

OF THE MEMORANDUM OR NOTE IN WRITING.

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§ 201. This clause of the statute is as follows: "Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."

For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the statute have in no way interfered with these principles. They have simply said that if the parties to be charged have signed some written note or memorandum of the contract, it shall be allowed to be good. What the legal effect of such a note or memorandum is to be in all other respects, is left entirely as it was at common law.

Law of evidence as to written contracts not changed by the statute.

§ 202. Now at common law, parties entering into any contract, may either reduce its terms to writing, or may refer to some other writing already in existence, as containing the terms of their agreement, and when they do so, they are bound by what is written, whether signed by them or not; and they are not allowed to say that there was a mistake in the writing, and that they intended to agree to something different from its contents, for the very object of putting the agreement in writing, is to prevent disputes about what they intended.¹ This rule of law is very inflexible. If, by the

Common law principles.

1. The writing need not be formal. A statement that the parties have agreed, may be an agreement. Curtis, J., in *Randall v. Rhodes*, 1 Curt. 92, said: "The general rule is that when negotiations have terminated in a written contract, the parties thereby tacitly affirm that such writing contains the whole contract, and no new terms are allowed to be added to it by extraneous evidence. But it is argued that this memorandum is not the written contract of sale, that it contains only a statement of the fact that a sale has been made, and a description of the thing sold, the price and terms of credit. But this is all that is necessary to make a complete contract of sale, and to assume that anything more existed, and allow it to be shown, would violate the rule above stated." Therefore evidence of a warranty not in writing was

rejected. See *Barry v. Coombe*, 1 Peters 640; *Kuhn v. Brown*, 1 Hun 244, 248; *Schultz v. Coon*, 51 Wis. 416. "The law presumes that all the talk in the negotiation, deemed essential, is included in the written consummation of the contract." *Daggett v. Johnson*, 49 Vt. 345, 348. An accurate statement of this principle of law was recently made by Vice-Chancellor Van Fleet, in *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233, (affirmed on appeal, Id. 826,) in these terms: "The general rule may be thus expressed: Where the parties to a contract have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence, therefore, of what was said

agreement, the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a pre-existing writing, neither party is allowed to offer proof that any additional terms were agreed to, although, of course, whenever a duty or obligation of any sort results by virtue of the law, or of local customs, or the usages of particular trades, from the written stipulations, such duty or obligation may not only be enforced, as though it were expressly included among the written terms, but is as carefully guarded by the rule now under consideration, as if expressed in the written paper, and cannot be contradicted or qualified by parol evidence. (a)

§ 203. But the common law does not prohibit parties from making contracts of which only part is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing and the price may be agreed on by parol, or *vice versa*, or the parties may say in substance, "we agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth," and there is no legal objection to this. Parol evidence may be used to show what were the additions and exceptions, and the writing is conclusive as to the rest.²

during the negotiation of the contract or at the time of its execution, must be excluded on the ground that the parties have made the writing the only repository and memorial of the truth; and whatever is not found in the writing must be understood to have been waived and abandoned." See *Wilson v. Deen*, 74 N. Y. 531, 534. But see note 2, *infra*, and see *Chapin v. Dobson*, 78 N. Y. 74, stated in note 7, *infra*.

(a) Per Blackburn, J., in *Burges v. Wickham*, 3 B. & S. 669, 33 L. J., Q. B. 17. But see the language of Williams, J., in giving the decision of the Exchequer Chamber in *Clapham v. Langton*, 34 L. J., Q. B. 46. See, also, *Fawkes v. Lamb*, 31 L. J., Q. B. 98.

2. "A party may prove an oral collateral agreement, provided such agreement be not inconsistent with the written contract, and such are the cases of *Baschor, &c., v. Forbes*, 36 Md. 154; *Fusting's Executor v. Sullivan*, 41 Md. 162, and *Erskine v. Adlane*, L. R., 8 Ch. 766."

Robinson, J., in *Penniman v. Winner*, 54 Md. 127, 133. See *Hersom v. Henderson*, 21 N. H. 224. In *St. L., L. & W. Ry. Co. v. Maddox*, 18 Kan. 546, 551, *Horton, C. J.*, said: "A contract which is not required by statute to be in writing, may be partly expressed in writing and partly in an unwritten understanding between the parties, and, if so, such understanding may be by parol." *Healey v. Young*, 21 Minn. 389. See *Hope v. Balen*, 58 N. Y. 380; *Lewis v. Seabury*, 74 N. Y. 409; *Rollins v. Claybrook*, 22 Mo. 405; *Moss v. Green*, 41 Mo. 389; *Morehead v. Murray*, 31 Ind. 418; *Clarke v. Tappin*, 32 Conn. 56; *Barker v. Bradley*, 42 N. Y. 316. If the writing is unintelligible, the parol contract which it was meant to express, may be proved, if not within the statute. *Moulding v. Prussing*, 70 Ill. 151. A written contract not within the statute may be changed by a subsequent parol agreement. See *infra*, § 214, note 16. Misrepresentations made to induce the making of the contract may

§ 204. When either a part, or the whole of an agreement, is thus made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. But this result only takes place when the writing is by the consent of both parties agreed to be that which settles and contains their contract in whole or in part. The case is different, if one of the parties chooses to write down for himself, without the concurrence and assent of the other, or if a bystander, without the authority of both, should write out what they said. The writing of the bystander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be receivable in evidence against him as an admission, and the same would be the case as to what one party had written down for

be proved to avoid it. See "Fraud," Book III., ch. II., *post*. A bill of parcels is not an agreement, and receipt and payment of such bill will not estop the buyer from proving an oral warranty and recovering for its breach. *Atwater v. Clancy*, 107 Mass. 369, 375. In Pennsylvania parol evidence to vary a written agreement is admitted with great freedom. In *Greenawalt v. Kohne*, 85 Penna. 369, 375, *Sharswood, J.*, said: "It is agreed that the English rule, excluding parol evidence to vary a written contract, has not been adopted in this state in all its stringency. The exceptions indeed have almost eaten out the heart of the rule itself, but it is not altogether abolished, as may be seen in *Martin v. Berens*, 67 Penna. 459. But from *Hurst's Lessees v. Kirkbride*, decided in 1773, reported by C. J. Tilghman in *Wallace v. Baker*, 1 Binn. 610, down to the present time, this court has uniformly held that where, at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, that parol

evidence is admissible, though it may vary and materially change the terms of the contract." See *Miller v. Henderson*, 10 S. & R. 290; *Powelton Coal Co. v. McShain*, 75 Penna. 238; *Lippincott v. Whitman*, 83 Penna. 244; *Chalfant v. Williams*, 35 Penna. 212; *Grover v. Scott*, 80 Penna. 88, 94. There is one New York case which accords with the foregoing, *Chapin v. Dobson*, 78 N. Y. 74, where the buyer of chattels under a written contract of sale was allowed to prove a verbal agreement on the faith of which the contract was executed, that he might return the chattels if he should not be satisfied, and in that case need not pay the price. See this case stated note 7, *infra*. It is of course competent to prove an oral contract contemporaneous with a written agreement, if such oral contract does not conflict with that in writing, is founded on an independent consideration, and is not within the statute. *Babcock v. Deford*, 14 Kan. 408; *Polk v. Anderson*, 16 Kan. 243; *Malone v. Dougherty*, 79 Penna. 46; *Weeks v. Medler*, 20 Kan. 57, 64; *Lewis v. Seabury*, 74 N. Y. 409; *Duparquet v. Kimbel*, 24 Hun 653.

himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

§ 205. The statute of frauds leaves all this law quite as it was before. If the contract be in writing, in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment or of part acceptance and receipt to establish the validity of the contract. The writing in such a case is as indispensable in contracts for the sale of goods of less value than £10, as in those above that limit, and is as conclusive in settling what the terms of the bargain are as if the statute of frauds had never been passed. And where a party has signed a paper which is not a writing agreed upon between the two, as containing the terms of their agreement, his adversary may use the paper, if he please, as an admission made in his favor, but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written any greater than that of a verbal admission. In a word, it is always necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one*. (b)

§ 206. The two cases of *Ford v. Yates*, (c) and *Lockett v. Nicklin*, (d) afford an illustration of the effect of the statute of frauds, taken in connection with the common law rules of evidence on this subject. In *Ford v. Yates*, the memorandum of the sale made between the parties said nothing as to credit; it was a sale of two parcels of hops, one of thirty-nine pockets, and the other of five pockets, both at seventy-eight shillings. The vendor delivered the smaller parcel, but refused to deliver the thirty-nine pockets without payment; and the court held parol evidence inadmissible to show that the hops were sold at six months' credit, and that this had been the usual course of dealing between the parties. But in *Lockett v. Nicklin*, where the goods were ordered in a letter containing a reference to a conversation between the parties, and were supplied with an invoice, nothing being said either in the letter or the invoice

(b) The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Lord Blackburn.

(c) 2 M. & G. 549.

(d) 2 Ex. 93.

about the terms of payment, parol evidence was received of an agreement to give six months' credit. The distinction made was, that in *Ford v. Yates* the action was based on a *written contract* contained in the memorandum which could not be varied by parol evidence, while in *Lockett v. Nicklin* the *sale was really by parol*, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods; so that the purchaser was at liberty to supplement the proof of the bargain, by showing that there was an additional stipulation; namely, an agreement for six months' credit.

§ 207. It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but the examination of this clause of the statute would be very incomplete without some reference to the decisions which determine in what cases, for what purposes, and to what extent, parol evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing of the bargain sufficient to satisfy the seventeenth section.

§ 208. It must be steadily borne in mind that the statute was not enacted for cases where the parties, either in person or by agents, have signed a written contract; for in those cases the common law affords by its rules quite a sufficient guaranty against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some written note or memorandum* of the bargain—not to the bargain itself—could be shown. (e) The existence of the note or memorandum pre-supposes an antecedent contract by parol, of which the writing is a note or memorandum.⁸

§ 209. [It is a simple deduction from this theory of the statute that parol evidence is always admissible to show that the writing which purports to be a note or memorandum of

Parol evidence, when admissible where there is a written note of the bargain.

True theory of this clause of the statute.

Parol evidence admissible to

(e) See the remarks of Erle, J., in *Cas. 305*. The statement in the text is to *Sievwright v. Archibald*, 17 Q. B. 124; be found *passim* in the cases on this subject. 20 L. J., Q. B. 529; of Williams, J., in *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; 3. *Townsend v. Hargraves*, 118 Mas. 325; *Bird v. Munroe*, 66 Me. 337; 30 L. J., C. P. 150; and of Lord Wensleydale in *Ridgway v. Wharton*, 6 H. L. *Learned v. Wannemacher*, 9 Allen 412.

the bargain is not a record of any antecedent parol contract at all, (*f*) for, as was said by Lord Selborne in *Jervis v. Berridge*, (*g*) the statute of frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.]⁴

show that the writing produced is not a record of any contract at all.

On the same principle parol evidence is admissible for the purpose of showing that the written paper is *not* a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view.

Also to show that the writing is not a note of the whole bargain.

Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and the writing is thus shown not to be a note of the agreement, but only of some of its terms. (*h*)⁵

So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was admitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation. (*i*)⁶

(*f*) *Pym v. Campbell*, 6 E. & B. 370; *Wake v. Harrop*, 6 H. & N. 768; *Clever v. Kirkman*, 24 W. R. 159; 33 L. T. (N. S.) 672; *Hussey v. Horne-Payne*, 4 App. Cas. 311, per Lord Cairns, at p. 320.

(*g*) 10 Ch. at p. 360.

4. *Hildreth v. O'Brien*, 10 Allen 104; *Rennell v. Kimball*, 5 Id. 356; *Hazard v. Loring*, 10 Cush. 267; *Butler v. Smith*, 35 Miss. 457, 463; *Leppoc v. Bank*, 32 Md. 136, 144; *Blake v. Coleman*, 22 Wis. 415; *Shughart v. Moore*, 78 Penna. 469; *James v. Muir*, 33 Mich. 223; *Deshon v. Ins. Co.*, 11 Metc. 199; *Earle v. Rice*, 111 Mass. 17, 20; *Grierson v. Mason*, 60 N. Y. 394; *McKesson v. Sherman*, 51 Wis. 303, 312; *Wright v. McPike*, 70 Mo. 175, 179. But see *Wemple v. Knopf*, 15 Minn. 440. In *Kalamazoo, &c., Co. v. McAllister*, 40 Mich. 84, *Graves, J.*, said: "In order to exclude oral evidence of a contract, it must be first settled that there is a subsisting written contract, between the parties, and where the immediate issue is whether there is or was a writing cover-

ing the contract, it is not competent to exclude oral testimony bearing on that issue upon an assumption of such writing. To do so is to beg the question."

(*A*) *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; S. C., 26 L. J., Ex. 145; *Acebal v. Levy*, 10 Bing. 376.

5. See § 251, *infra*.

(*i*) *Pitts v. Beckett*, 13 M. & W. 743.

6. A Broker's Memorandum is Insufficient if it Omits a Warranty which was Given.—*Peltier v. Collins*, 3 Wend. 459. In this case, the memorandum of sale made by a broker omitted the seller's warranty, and it was held to be fatal to the action for damages for not accepting. See *Sale v. Darragh*, 2 Hilt. 184, 198. In *Boardman v. Spooner*, 13 Allen 353, 359, the memorandum omitted a provision of the oral sale that one of the buyers should judge of the quality. *Foster, J.*, said: "The omission of the condition that the purchase was subject to the approval of the vendees as to the quality,

[And in a recent Irish case, where the writing offered in evidence was the auctioneer's sales-book which contained no statement that the sale was by sample, parol evidence was admitted, on behalf of the defendant, to prove that the sale was by sample, and that therefore the auctioneer's book was not a memorandum of the whole contract. (k)]

§ 210. And the same principle which permits the defendant to offer parol evidence, showing that the written note is imperfect, and therefore *not* such a note as satisfies the statute, forbids him who sets up the writing for the purpose of binding the other from supplementing the writing by parol proof of terms or stipulations not contained in it; for it is manifest, that by offering such proof, he admits that the writing does not contain a note of the bargain, but only of part of it. (l) ⁷

Inadmissible
to supplement
an imperfect
note.

constitutes a material variance between the contract as made and as written down in the broker's book." He cites *Peltier v. Collins*, *supra*, and says: "That a contemporaneous agreement of warranty cannot be engrafted by oral evidence on a written instrument, is well settled in this state." Cites *Warren v. Wheeler*, 8 Metc. 97; *Dutton v. Gerrish*, 9 Cush. 89; *Raymond v. Raymond*, 10 Cush. 134; *Howe v. Walker*, 4 Gray 318. In *Pike v. Fay*, 101 Mass. 134, the buyer, when sued for not accepting under a written contract, was permitted to prove that the sale was by a sample shown, and that the goods offered were rejected as not corresponding with the sample. The price, however, was less than \$50. See *Mayer v. Adrian*, 77 N. C. 83, 91. It must be observed that, in the above-stated cases of *Peltier v. Collins*, *Boardman v. Spooner*, and *Mayer v. Adrian*, the memorandum was made by an agent. Had the parties signed the memorandum as a contract, neither would have been permitted to question its completeness by parol evidence. *Etheridge v. Palin*, 72 N. C. 213. Thus, in *Frost v. Blanchard*, 97 Mass. 155, defendants ordered and accepted goods in writing, but attempted to defend for breach of an oral warranty. *Foster, J.*, said: "A previous or contemporaneous warranty cannot be

engrafted by parol evidence on a written contract." (It would seem that a subsequent warranty might be oral, but if so, a new consideration would be essential to its validity.) And even though the contract was signed by an agent, it does not follow that its terms can be questioned. If he is a general agent, his principals are bound by the terms of his contract as expressed in the writing. But if he is an ordinary broker, negotiating a sale, he has no authority except what is derived from that single contract. "A broker is authorized to sign only that contract into which the vendor has entered, not another different contract. If he omits to include in the memorandum special exceptions and conditions to the bargain, he signs a contract which he has no authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to sign that contract." *Bigelow, C. J.*, in *Coddington v. Goddard*, 16 Gray 436, 445.

(k) *M'Mullen v. Helberg*, 4 L. R., Ir. 94, on app. 6 L. R., Ir. 463.

(l) *Boydell v. Drummond*, 11 East 142; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Holmes v. Mitchell*, 7 C. B. (N. S.) 361, and 28 L. J., C. P. 201; *Harrow v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53.

7. The whole Contract Sued upon must be in Writing.—See note 17, *in-*

[And this statement of the law was approved by O'Brien, J., in the Irish case of *M'Mullen v. Helberg*, 4 L. R., Ir. 94. at p. 110.]

fra. "A contract required by the statute of frauds to be in writing cannot be partly in writing and partly in parol." *Frank v. Miller*, 38 Md. 450, 460; *Lazear v. National Union Bank*, 52 Md. 78, 120; *Jang v. Henry*, 54 N. H. 57; *Randall v. Rhodes*, 1 Curt. 90; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 24; *Dana v. Hancock*, 30 Vt. 616; *Millett v. Marston*, 62 Me. 477; *Stevens v. Haskell*, 70 Me. 202; *Keller v. Webb*, 126 Mass. 393; *Spence v. Bowen*, 41 Mich. 149; *Caulkins v. Hellman*, 14 Hun 380; *Marks v. Cass Co. Mill Co.*, 43 Iowa 146. Parol evidence to add the word "sold" to a written memorandum of a sale, thereby making it an intelligible contract, was held not admissible, though the word was omitted by mistake. *Lee v. Hills*, 66 Ind. 474, 481. But the law will supply whatever is fairly to be implied from the writing though not expressed. Thus when the memorandum recited that A had sold certain property to B, the United States Supreme Court held that this sufficiently showed that B had bought the property from A. *Butler v. Thomson*, 92 U. S. 412. See, also, *Salmon Falls, &c., Co. v. Goddard*, 14 How. 446. Parol evidence is not admissible to add a warranty of quality or quantity to a written contract of sale. *Etheridge v. Palin*, 72 N. C. 218; *Frost v. Blanchard*, quoted in note 6, *ante*. But where a memorandum had been made, and part of the price paid also, it was held that the buyer might show a mistake in the writing, the part payment having satisfied the statute. *Hicks v. Cleveland*, 48 N. Y. 84, 91. See *post*, § 212, note 12. See, also, *Kribs v. Jones*, 44 Md. 396, 408. On the other hand, in *Wiener v. Whipple*, 53 Wis. 298, the plaintiff bought barley and made a partial payment, and stated the terms in writing signed by both parties. Afterwards he brought suit for damages, al-

leging that the sale was by sample, and that the barley tendered was not equal to the sample. The writing did not mention that the sale was by sample. It was held that the plaintiff could not prove that fact by oral testimony. *Taylor, J.*, said: "It has been often held that the party not assenting to the making of such memorandum is not bound thereby, and may prove the terms of the parol contract for the very purpose of showing that the memorandum does not state the real contract between the parties, and so defeat a recovery upon it under the statute of frauds for want of a sufficient note or memorandum thereof in writing. See *Benjamin on Sales*, § 209. It is evident that the principle of these cases can have no application to a case where it is shown that both parties have assented to and signed the writing." In *Chapin v. Dobson*, 78 N. Y. 74, a written agreement was made to sell three machines for \$300 each. On a suit for the price, defendant set up that the purchase was made in consideration of an oral agreement by the sellers to take back the machines without requiring payment if they did not work to the buyer's satisfaction, and the defence was sustained. *Danforth, J.*, said that the general rule requiring the rejection of parol evidence where the contract is written, "does not apply where the original contract was verbal and entire, and a part only reduced to writing." The statute of frauds is not referred to in the opinion. The suit was upon a Pennsylvania contract, and in that state the seventeenth section is not law; but this does not explain the case, for the court expressly assumes the *lex loci* to be the same as the *lex fori*. It is not easy to reconcile this case with the general principle that makes a written contract conclusive as to all the terms. See *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233,

It is also on this principle that when the bargain is to be made out by separate written papers, parol evidence is not allowed to connect them, but they must either be physically attached together, so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other, (*m*) as will be fully seen, *infra*, (§§ 220 to 231).⁸

Inadmissible
to connect
separate writ-
ten papers.

But where a purchaser agreed to pay by a cheque (*n*) on his brother, the court held that this was not one of the terms which need appear in the writing; and further, that parol proof that under the contract certain candlesticks were to be made with a gallery to receive a shade, did not affect the sufficiency of the writing which described them as "candlesticks complete." (*o*).

§ 211. Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject matter to which the writing refers. (*p*)⁹ Thus, where the written letter contained an agreement to

Admissible to
identify the
subject matter,

Wilson v. Deen, 74 N. Y. 531, stated *ante*, § 202, note 1. The case of *Greenawalt v. Kohne*, 85 Pa. 369, is very similar in facts and in the conclusion reached, with *Chapin v. Dobson*, but, as before stated, the statute of frauds in Pennsylvania does not affect sales of goods.

One not a Party to a Written Agreement may controvert it by Parol Evidence.—There is an important exception to the rule that an agreement in writing is the best evidence, namely, that one not connected with the agreement may show by oral evidence what the real transaction is. *Brown v. Thurber*, 77 N. Y. 613; *Crowley v. Pendleton*, 46 Conn. 62; *Talbot v. Wilkins*, 31 Ark. 411, 420; *Smith v. Moynihan*, 44 Cal. 53; *Husman v. Wilke*, 50 Cal. 250; *Reynold v. Magness*, 2 Ired. 30; *Coleman v. First National Bank of Elmira*, 53 N. Y. 388; *McMaster v. Ins. Co.*, 55 N. Y. 222, 234.

Parol Evidence of a Sale within the Statute, if admitted without Objection, will sustain a Verdict.—*Montgomery v. Edwards*, 46 Vt. 151.

(*m*) *Hinde v. Whitehouse*, 7 East 558; *Kenworthy v. Scofield*, 2 B. & C. 945; *Pierce v. Corf*, L. R., 9 Q. B. 210; *Rish-ton v. Whatmore*, 8 Ch. D. 467. But see *Baumann v. James*, 3 Ch. 508; *Long v. Millar*, 4 C. P. D. 450, C. A.; *Cave v. Hastings*, 7 Q. B. D. 125.

8. See note to § 220, *infra*.

(*n*) *Secus*, as to payment by a bill. *Mahalen v. The Dublin and Chapelizod Distillery Co.*, 11 Ir. R. C. L. 83.

(*o*) *Sarl v. Bourdillon*, 26 L. J., C. P. 78; 1 C. B. (N. S.) 188.

(*p*) *Bateman v. Phillips*, 15 East 472; *Shortrede v. Cheek*, 1 Ad. & E. 57; *Mumford v. Gething*, 7 C. B. (N. S.) 305, and 29 L. J., C. P. 105; *Chambers v. Kelly*, 7 Ir. R. C. L. 231.

9. Thus in *Wright v. Deklyn*, Pet. C. C. 199, evidence was admitted of the auctioneer's declarations to show what the property mentioned in the note was. See *Barry v. Coomba*, 1 Pet. 640; *Swett v. Shumway*, 102 Mass. 365; *Keller v. Webb*, 125 Mass. 88; *Noyes v. Canfield*, 27 Vt. 79; *Sandford v. Newark, &c., R.*

purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool." (q)

Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances; (r) to explain the language, as for instance, to show that the bought and sold notes have the same meaning among merchants, though the language seems to vary; (s) and to show the date when the bargain was made. (t) ¹⁰

Also, to show situation of parties.

[It is also admissible to show that alterations which have been made in the document signed by one of the parties were assented to by the other party; the effect of the evidence being not to vary the written instrument but to show what was its condition when it became the memorandum of the contract. (u)] ¹¹

Also alterations assented to by the other party.

Parol evidence was likewise admitted to show that a sale of "fourteen pockets of Kent hops, at one hundred shillings," meant one hundred shillings per hundredweight, according to the usage of the hop trade. (x)

Also the meaning of words according to trade usage.

R., 37 N. J. L. 1; *Ball v. Benjamin*, 73 Ill. 39; *Bickett v. Taylor*, 55 How. Pr. 126.

(q) *Macdonald v. Longbottom*, 23 L. J., Q. B. 293; S. C. on appeal, 1 E. & E. 977, and 29 L. J., Q. B. 256; and see *Shardlow v. Cotterell*, 20 Ch. D. 90, C. A.; reversing S. C., 18 Ch. D. 280, a case of a sale of real estate, where the word "property" was held to be a sufficient description.

(r) Per *Tindal, C. J.*, in *Sweet v. Lee*, 3 M. & G. 466.

(s) *Bold v. Rayner*, 1 M. & W. 342; and per *Erle, C. J.*, in *Sievwright v. Archibald*, 17 Q. B. 124; 20 L. J., Q. B. 529.

(t) *Edmunds v. Downs*, 2 C. & M. 459; *Hartley v. Wharton*, 11 Ad. & E. 934; *Lobb v. Stanley*, 5 Q. B. 574.

10. *Circumstances, Date and Meaning may be Explained by Parol.*—*Salmon Falls Manfg. Co. v. Goddard*, 14 How. 446; *Dana v. Fiedler*, 12 N. Y. 40; *Hagan v. Domestic, &c., Co.*, 9 Hun 73; *Pollen v. Le Roy*, 30 N. Y. 549; *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y. 422; *Blossom v. Griffin*, 13 N. Y. 569;

Draper v. Snow, 20 N. Y. 331; *Moore v. Meacham*, 10 N. Y. 207; *Reynolds v. Insurance Co.*, 47 N. Y. 605; *Peisch v. Dickson*, 1 Mason 9, 11; *Gately v. Irvine*, 51 Cal. 172; *Cole v. Howe*, 50 Vt. 35; *Polk v. Anderson*, 16 Kan. 243; *Chamberlain v. Black*, 64 Me. 40. "The rule which admits extrinsic evidence for the purpose of applying a written contract to its proper subject matter, extends beyond the mere designation of the thing on which the contract operates, and embraces within its scope the circumstances under which the contract concerning that thing was made." *Barbour, J.*, in *Bradley v. Washington, &c., Co.*, 13 Pet. 89, 102. In an action for breach of a warranty in a written contract of sale, parol evidence was admitted to show that the defect was known to plaintiff, and therefore the warranty was not intended to cover it. *Bennett v. Buchan*, 76 N. Y. 386, 391. (u) *Stewart v. Eddowes*, L. R., 9 C. P. 311.

11. *Hicks v. Cleveland*, 48 N. Y. 84, 91.

(x) *Spicer v. Cooper*, 1 Q. B. 424.

[But it should be remembered that when the evidence in support of a trade usage seeks to alter the natural meaning and construction of the words as written, it must in every case be clear and consistent.] (y)

Evidence must be clear and consistent.

§ 212. Parol evidence is also admissible to show a mistake in drawing up the bought and sold notes (whereby certain goods were omitted,) in an action of trover by the vendors against the purchaser for the goods so omitted after they had been paid for, and taken into possession by the purchaser. (z) 12

Also mistake in omitting goods in bought and sold notes.

Also to show that a written document, purporting to be an agreement, and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a future event; (a) or was even to be modified upon some future contingency. (b) 13

Also to show that writing was only to take effect conditionally.

Also to explain a latent ambiguity in a contract of sale, as where a bargain was made for the sale of cotton, "to arrive ex 'Peerless' from Bombay," parol evidence was held admissible to show that there were two ships "Peerless" from Bombay, and that the ship "Peerless" intended by the vendor

To explain latent ambiguity.

(y) *Bowes v. Shand*, 2 App. Cas. 455.

(z) *Steele v. Haddock*, 10 Ex. 643; 24 L. J., Ex. 78.

12. In *Hicks v. Cleveland*, 48 N. Y. 91, the plaintiff claimed certain property, only part of which was mentioned in his written agreement of purchase, but for all of which he claimed to have paid. Earl, C., said: "As it was of the value of more than \$50 he was simply required to comply with the statute of frauds; and this he did by paying the whole or a part of the purchase money. If, therefore, by mistake, as now claimed, the writing did not express the intention of the parties, and did not cover the property really sold, the plaintiff did not lose the property, but can show by parol precisely what it was that he bought." But where by mistake each party signed the wrong note of sale, it was held that the papers could not be admitted as evidence. Can-

teberry v. Miller, 76 Ill. 355.

(a) *Pym v. Campbell*, 6 E. & B. 370; 25 L. J., Q. B. 277; *Furness v. Meek*, 27 L. J., Ex. 34; *Davis v. Jones*, 25 L. J., C. P. 91.

(b) *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J., Ex. 241.

13. See § 209, note 4, *ante*. It is a familiar principle in equity that a contract of sale, absolute by its terms, may be shown by oral evidence to be intended as security for a debt. "The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument." *Brick v. Brick*, 98 U. S. 514, 516; *Peugh v. Davis*, 96 Id. 336.

was a different ship "Peerless" from that intended by the buyer, so as to establish a mistake defeating the contract for want of a *consensus ad idem*. (c) 14

§ 213. The admissibility of parol evidence of particular *commercial usages* to engraft terms into the bargain, or even to introduce conditions apparently at variance with the implication resulting from the written stipulations (as was done in *Field v. Lelean*, (d) where evidence was admitted of a usage in the sale of mining shares, not to make delivery before payment, although the written terms were for a price payable *in futuro*), is too large a branch of the subject to be here treated in detail, and the reader must be referred to the decisions which are collected and classed in the notes to *Wigglesworth v. Dallison*, in the first volume of *Smith's Leading Cases*. (e) 15

As to particular commercial usages.

Field v. Lelean.

[*Alexander v. Vanderzee*, L. R., 7 C. P. 530, and *Ashworth v. Redford*, L. R., 9 C. P. 20, are recent cases, which illustrate the method of construing particular mercantile terms apart from any trade usage.]

§ 214. After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the statute, the question often arises as to the admissibility of parol proof of a subsequent agreement to change or annul it.

Parol evidence as to subsequent agreement to alter or annul the written note.

At common law it is competent to the parties at any time after an agreement (not under seal) has been reduced to writing and signed, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or

(c) *Raffles v. Wichelhaus*, 2 H. & C. 438, C. A. 906; 33 L. J., Ex. 160.

14. *Robinson v. United States*, 13 Wall. 363; *Heinemann v. Heard*, 39 N. Y. 98. In *Thorington v. Smith*, 8 Wall. 1, 12, parol evidence was admitted to show that the word "dollars" in a written contract meant confederate dollars. To the same effect see *Atlantic, &c., R. R. Co. v. Carolina, &c., Bank*, 19 Wall. 548.

(d) 6 H. & N. 617; 30 L. J., Ex. 168. See, also, *Bissell v. Beard*, 28 L. T. (N. S.) 740.

(e) Vol. I. (8th ed.), p. 602, *et seq.*; and see *Johnson v. Raylton*, 7 Q. B. D.

15. See *Boardman v. Spooner*, 13 Allen 353, 359, 360; *Haskins v. Warren*, 115 Mass. 514, 536; *Whitney v. Boardman*, 118 Id. 242; *Salmon Falls Manfg. Co. v. Goddard*, 14 How. 446; *Miller v. Stevens*, 100 Mass. 518; *Steward v. Scudder*, 24 N. J. L. 96; *Barnard v. Kellogg*, 10 Wall. 383; *Oelrichs v. Ford*, 23 How. 49; *Robinson v. United States*, 13 Wall. 365. An express contract cannot be contradicted by proof of usage or custom. *Schenck v. Griffin*, 38 N. J. L. 462, 471; *Spears v. Ward*, 48 Ind. 541.

qualify its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement. (*f*)¹⁶

But this principle of the common law is not applicable to a contract for the sale of goods under the statute of frauds. No verbal agreement to abandon it in part, or to add to, or omit, or modify any of its terms, is admissible.

Thus parol evidence is not admissible to change the place of delivery fixed in the writing, (*g*) nor the time for the delivery; (*f*) nor to prove a partial waiver of a promise to furnish a good title; (*g*) nor a modification of a stipulation for a valuation; (*h*) nor a change in any of the terms; for the courts can draw no distinctions between stipulations that are material and those that are not. (*i*)¹⁷

(*f*) Per Denman, C. J., in *Goss v. Lord Nugent*, 5 B. & Ad. 65.

16. In *Thurston v. Ludwig*, 6 Ohio St. 1, 5, Bartley, C. J., said: "It appears to be well settled that *subsequent* to the execution of a written contract, it is competent for the parties by a *new contract*, *although not in writing* either to abandon, waive or annul the prior contract, or vary or qualify the terms of it in any manner. And where the verbal contract only changes or modifies some of the terms of the original contract, it embraces by reference all the written stipulations of the original undertaking, and is to be proved by the verbal agreement taken in its connection with the written contract. But where a written contract is thus either totally abandoned and annulled, or simply altered or modified in some of its terms, it is done, and *can only be done* by a distinct and substantive contract between the parties founded on some *valid consideration*." In *Swain v. Seamens*, 9 Wall. 254, 271, Clifford, J., said: "In cases not within the statute of frauds, and which fall within the general rules of the common law, it is held that the parties to an agreement, though it is in writing, may at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it was within the

statute of frauds." *Emerson v. Slater*, 22 How. 28, 41, citing *Goss v. Nugent*; *Brown v. Everhard*, 52 Wis. 207; *Muselman v. Stoner*, 31 Penna. 263; *Miller v. Fichthorn*, 31 Id. 252; *Allen v. Sowerby*, 37 Md. 410; *Seamen v. O'Hara*, 29 Mich. 66; *Rhodes v. Thomas*, 2 Ind. 638; *Westchester Ins. Co. v. Earle*, 33 Mich. 143, 153; *Bank v. Woodward*, 5 N. H. 99; *Wiley v. Hall*, 8 Iowa 62; *Hewitt v. Brown*, 21 Minn. 163; *Wiggin v. Goodwin*, 63 Me. 389; *Heatherly v. Record*, 12 Tex. 49; *Flanders v. Fay*, 40 Vt. 316.

(*g*) *Moore v. Campbell*, 10 Ex. 323, and 23 L. J., Ex. 310; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 Ad. & E. 57.

(*f*) *Noble v. Ward*, L. R., 1 Ex. 117; 35 L. J., Ex. 81.

(*g*) *Goss v. Lord Nugent*, 5 B. & Ad. 65.

(*h*) *Harvey v. Grabham*, 5 Ad. & E. 61.

(*i*) Per Parke, B., in *Marshall v. Lynn*, 6 M. & W. 116. See, also, *Emmett v. Dewhirst*, 21 L. J., Ch. 497. The cases in the notes to this paragraph overrule *Cuff v. Penn*, 1 M. & S. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591, and *Thresh v. Rake*, 1 Esp. 53; cf. *Sanderson v. Graves*, L. R., 10 Ex. 234, a case under the fourth section.

17. The principle stated in the text

But where there was an executory contract for the building of a landaulet described in the agreement, parol evidence was admitted of alterations and additions ordered by the purchaser from time to time, Gaselee, J., saying that "otherwise every building contract would be avoided by every addition." (k)

Alterations
ordered by
buyer in
chattel manu-
factured for
him.

has not been unquestioned in this country, Massachusetts courts adopting *Cuff v. Penn* as authority, though overruled in England, as stated in our author's note, (i) *supra*. The weight of authority sustains the principle of the text.

A Written Contract within the Statute cannot be Varied by an Oral Contract.—The question was raised in the United States Supreme Court in *Emerson v. Slater*, 22 How. 28, 42, but the court said it was unnecessary to determine it. It was raised again in *Swain v. Seamens*, 9 Wall. 254, 272. Clifford, J., said: "The better opinion is that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing." Refers to *Marshall v. Lynn*, cited by our author. There is an older case (1799) in the same court which would seem to settle the question, (*Clarke v. Russell*, 3 Dall. 415, 424,) where Ellsworth, C. J., said: "The undertaking declared upon must, to save it from the statute of frauds, be in writing and wholly so. The two letters, therefore, which are relied upon as the written agreement, cannot be added to or varied by parol testimony. Nor can they be so far explained by parol testimony as to affect their import with regard to the supposed undertaking. The charge, then, of the judge that they might be explained by parol testimony, expressed as a general rule, and without any qualifications or exceptions, was too broad, and may

have misled the jury." In *Blood v. Goodrich*, 9 Wend. 68, 79, Savage, C. J., said: "There are cases when the time of performance of a written contract may be enlarged by parol; but I apprehend that doctrine does not apply where the contract itself would not have been valid if made by parol." In *Vicary v. Moore*, 2 Watts 451, 457, Gibson, C. J., said: "The altering of a written contract by parol makes it all parol." In *Muselman v. Stoner*, 31 Penna. 265, 269, evidence was offered to show an oral agreement subsequent to a written contract of sale of horses that they should be delivered at a certain place. Lowrie, C. J., said: "Is this admissible? Its purpose is not to put the court into position to construe the transaction. It is to take the place of construction and execute its functions by supplying the deficiencies in the express agreement. Can this be allowed? Of course it cannot in cases where the law requires the contract to be in writing, for then essential defects that cannot be supplied by construction are fatal." In *Dana v. Hancock*, 30 Vt. 616, 619, Redfield, C. J., said: "If any of the terms of such contract are altered by contract not in writing, the entire contract is thereby reduced to the grade of a mere unwritten contract, upon which the statute expressly declares that no action shall be maintained. * * * It seems to us that a moment's reflection must satisfy every one that if the action is only to be maintained upon the oral evidence offered at the trial, the action is

(k) *Hoadley v. M'Lain*, 10 Bing. 489; this dictum, in *Sanderson v. Graves*, L. R., 10 Ex., at page 237.

In *Brady v. Oastler*, (1) the action was for damages for breach of contract in not delivering certain goods within the time fixed by a written contract, and the plaintiff offered parol evidence to prove, as an element of consideration for the jury in

*Brady v.
Oastler.*

not maintained upon any contract in writing." In *Ladd v. King*, 1 B. I. 224, there is a clear statement of the whole question, and the Massachusetts case of *Cummins v. Arnold*, *infra*, is keenly criticised. Greene, C. J., says: "Upon the principle adopted by the Supreme Court of Massachusetts the purchaser, under a written contract, may be deprived of the land he agreed for, and compelled, upon the strength of a subsequent verbal agreement of which performance has been tendered, to accept other land. We think if the performance is changed, the contract is changed; that when there is a substituted performance agreed upon, whether as to time or subject matter, there is a substituted contract, and, if it relates to land, it must be in writing." The principle is the same as to sales of goods by contract in writing. See *Hasbrouck v. Tappen*, 15 Johns. 200; *Schultz v. Bradley*, 57 N. Y. 646; *Kribs v. Jones*, 44 Md. 396; *Carpenter v. Galloway*, 73 Ind. 418; *Cooper v. Cleg-horn*, 50 Wis. 113.

In Massachusetts the Performance of Contracts Within the Statute may be Varied by Parol Agreement.—In *Cummings v. Arnold*, 3 Metc. 486, 491, *Cuff v. Penn* is approved and followed, *Wilde, J.*, saying: "The statute requires a memorandum of the bargain to be in writing, that it may be made certain, but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts." In this case a parol agreement changing

terms of payment was admitted in evidence. Following this case, in *Stearns v. Hall*, 9 Cush. 31, the same court sustained as valid an oral enlargement of time to perform a written contract to purchase a house and lot. These cases were followed in *Whittier v. Dana*, 10 Allen 326, but it is held that the action can only be on the written instrument. In *Blanchard v. Trim*, 38 N. Y. 225, *Hunt, C. J.*, approved *Cummings v. Arnold* and *Cuff v. Penn*, but he seemed to be unaware that *Cuff v. Penn* had been overruled, and besides his language is mere *dictum*. In *Organ v. Stewart*, 60 N. Y. 413, 419, *Andrews, J.*, said it was not necessary to consider the doctrine laid down in *Cuff v. Penn*, and approved in the three cases last above stated, though overruled in England, because in the case before the court the claim was to engraft on the original contract a distinct subject matter by parol, which could not be supported without disregarding the statute. *Cuff v. Penn* was followed in *Watkins v. Hodges*, 6 Harr. & J. 38, 46. This case has been often cited in Maryland, but not as to parol variation of a contract within the statute. In *Richardson v. Cooper*, 25 Me. 450, *Cummings v. Arnold* is cited and followed, and it is cited with approval in *Negley v. Jeffers*, 28 Ohio St. 90, 100.

Those Terms which the Law adds by Implication to a Written Contract Within the Statute, cannot be Varied by Parol.—Thus a clean bill of lading imports a contract to stow goods under the deck, and parol evidence cannot be admitted of a different agreement. *The Delaware*, 14 Wall. 679. But see *Chalfant v. Williams*, 35 Penna. 212.

(1) 3 H. & C. 112; 33 L. J., Ex. 300.

estimating damages, that the price fixed in the contract was above the market price, and that he had assented to pay this extra price because of the short term allowed for delivery; but the evidence was rejected by Bramwell, B., at Nisi Prius, and his ruling was approved by Pollock, C. B., and Channel, B.; a strong dissenting opinion, however, was delivered by Martin, B.

§ 215. [Parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performing the original contract, *when that performance is completed*, is admissible.¹⁸ Thus, in *The Leather Cloth Co. v. Hieronimus*, (m) the contract was for the sale of goods to be forwarded to the purchaser by Ostend, and the goods were afterwards forwarded by Rotterdam, and evidence was

Parol evidence to prove substituted mode of performance.

Delivery by altered route.

18. *Effect of Substituted Performance Accepted.*—*Swain v. Seamens*, 9 Wall. 254; *Sovereign v. Ortman*, Mich. Sup. Ct., October, 1881; *McCombs v. McKennan*, 2 W. & S. 216; *Miles v. Roberts*, 34 N. H. 245; *Courtenay v. Fuller*, 65 Me. 156; *Allen v. Sowerby*, 37 Md. 410. In *Malone v. Dougherty*, 79 Penna. 46, Woodward, J., said: "It is well settled that in a case of a simple contract in writing, oral evidence is permissible to show that by a subsequent agreement the time of performance was enlarged, or the place of performance changed, the contract having been performed according to the enlarged time or at the substituted place, or the performance having been prevented by the act of the other party." The last clause is applicable only to contracts not within the statute, except where the Massachusetts rule, stated in last note, is in force. In *Long v. Hartwell*, 34 N. J. L. 116, 127, Van Syckel, J., refers to *Cummings v. Arnold*, and the English cases overruling *Cuff v. Penn*, and says: "But in none of these cases, so far as my investigation has reached, has it ever been doubted that a substituted performance, actually executed and accepted, would dispense the defend-

ant from liability on the contract. Whatever may be thought of the correctness of the rule in *Stead v. Dawber* and *Marshall v. Lynn*, it may be safely said that if the substituted performance in those cases had been actually executed and accepted, the result would have been different." In *Marsh v. Bellew*, 45 Wis. 36, 52, Taylor, J., said that in cases where an oral extension of time for payment on a written contract has been given, "either by parol or otherwise, and the purchaser has acted upon the faith of such extension or waiver, the courts have held the vendor bound by his contract." The grounds of these decisions are that time is not of the essence of the contract, and estoppel, and *Reed v. Chambers*, 6 Gill & J. 490, is cited to that effect. Most of the foregoing cases relate to sales of land. The notion of a "substituted performance" is borrowed from equity cases relating to contracts for lands, which by the fourth section of the statute of frauds must be in writing. The expression is misleading, used with reference to sales of chattels within the statute. Every contract of sale is an agreement to perform something; and an agreement for a substituted performance is an agreement to

(m) L. R., 10 Q. B. 140.

admitted to show that the defendant *by his conduct* had assented to the substituted mode of delivery. And so, although neither party to the contract may avail himself of a parol agreement to vary or enlarge the *time* of performance, yet, if the seller has postponed delivery at the verbal request of the buyer, or the buyer has forborne to claim delivery at the verbal request of the seller, neither the seller in the former, nor the buyer in the latter case is precluded from afterwards suing on the original contract.

Postponed
delivery.

In *Ogle v. Earl Vane*, (n) the defendant contracted to sell to the plaintiff five hundred tons of iron, delivery to extend to the 25th of July, 1865. Owing to an accident to the defendant's furnaces he had delivered none of the iron *by that date*. Afterwards negotiations passed between the parties, but eventually, in February, 1866, the plaintiff went into the market. The price of iron had risen since July, and the plaintiff sought to recover from the defendant the difference between the contract and the market price in February. The defendant paid into court the difference between the contract and the market price in July. The judge at the trial left it to the jury to say whether on the evidence they thought that the defendant had held out that he should be able to deliver the iron, and that the plaintiff had waited accordingly, in which case they might return a verdict for damages beyond the amount paid into court. The jury returned a verdict for the full amount claimed. Upon the argument of a rule to enter the verdict for the defendant, on the ground that there was no evidence to go to the jury of the plaintiff being entitled to more damages than were represented by the sum paid into court, it was objected, on behalf of the defendant, that any agreement for postponement ought to have been in writing to satisfy the statute

perform something else; in other words, it is a new contract. See *Ladd v. King*, 1 R. I. 224. If that new contract is oral it is within the statute, but by payment or by acceptance and receipt it is relieved from the bar of the statute, and may be proved. We then have two contracts, one written and one oral, and as neither of them is within the statute, the oral contract may be proved, though it modifies or sets aside the written contract, or though it adopts it and adds new terms, as we have already seen. See *ante* § 214

and note 16. See *Hicks v. Cleveland*, 48 N. Y. 84, 91, stated *ante* § 212, note 12; *Krebs v. Jones*, 44 Md. 396, 408. Such substituted contract must be established by showing that the part payment or the acceptance and receipt relate to the oral contract and not to the written contract, as shown in the preceding chapters IV. and V. See *ante* § 140, note 2, § 155, language of Cotton, L. J., and § 192, note 2.

(n) L. R., 3 Q. B. 272, in Ex. Ch. affirming S. C., L. R., 2 Q. B. 275.

of frauds; but it was held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, first, that there was evidence from which the jury might infer that the plaintiff's delay in going into the market was at the defendant's request; and, secondly, that as the evidence went to show, not a new contract, *but simply a forbearance by the plaintiff at the request of the defendant*, the statute of frauds did not apply.

§ 216. The cases bearing upon this point are considered in the judgment of the Court of Common Pleas in *Hickman v. Haynes*.⁽ⁿ⁾ The contract was for the sale by the plain- ^{*Hickman v. Haynes.*} tiff to the defendants of one hundred tons of pig-iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873. Seventy-five tons of iron were delivered during the months of March, April, and May respectively, in accordance with the contract, but early in June the defendants verbally requested the plaintiff, and the plaintiff consented, to postpone delivery of the remaining twenty-five tons. Upon the expiration of the contract time the plaintiff tendered the residue of the iron, but the defendants then refused to accept it. In an action for damages for breach of contract the plaintiff was held entitled to succeed. It was contended, on behalf of the defendants, that a new agreement for the delivery and acceptance of the remaining twenty-five tons of iron had been substituted for the original written contract, and that this new agreement being verbal could not be enforced; but the court held that the original contract still subsisted, and that the plaintiff could maintain an action upon it, that the assent to the defendants' request to give time was not a valid agreement binding the plaintiff, but a *voluntary forbearance* on his part; and the same distinction was drawn between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another, which had already been recognized in *Ogle v. Earl Vane*.

On the other hand, in *Plevins v. Downing*,^(o) the plaintiffs contracted to deliver one hundred tons of pig-iron, "twenty- ^{*Plevins v. Downing.*} five tons at once, and seventy-five tons in July next." By the end of July the plaintiffs had delivered, and the defendant had accepted, seventy-five tons in all. There was no evidence that the defendant had requested the plaintiffs, *before the end of July*, to withhold the delivery of the remaining twenty-five tons, but there

(n) L. R., 10 C. P. 598.

(o) 1 C. P. D. 220.

was evidence that in *October* the defendant *verbally* requested the plaintiffs to forward twenty-five tons, which, when forwarded, he declined to accept. Held, that the plaintiffs could not sue on the original contract, inasmuch as they were unable to prove that they were ready and willing to deliver the twenty-five tons at the end of July, and had only withheld delivery at the defendant's request, neither could they rely upon the request to deliver made to them by the defendant in October, as that would have been to substitute a parol for a written agreement.

"It is true," said Brett, J., (at p. 225,) in delivering the judgment of the court, "that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect in favor of either to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so, made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages * * * but if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, *he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract.* The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be result of the cases which are summed up in *Hickman v. Haynes.*"

In *Tyers v. The Rosedale Iron Co.*, (p) the defendants were the sellers and the plaintiffs the purchasers of iron deliverable in monthly quantities over 1871. The defendants with-

Tyers v. Rosedale Iron Co.

held delivery of various monthly quantities at the plaintiffs' request. Afterwards, in December, 1871, *the last month* fixed in the contract for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery, it was held by the Exchequer Chamber, reversing the decision of the majority of the Court of Exchequer, that the defendants were not entitled to refuse to deliver more than the monthly quantity. It became unnecessary, in the Exchequer Chamber, to decide whether the defendants were bound to deliver in December all that remained to be delivered under the contract, or whether they had a reasonable time within which to deliver, because the plaintiffs agreed to have the damages assessed at the market price of iron in December, and this arrangement, in a rising market, was more favorable to the defendants. The opinion of the Exchequer Chamber evidently was in favor of their having a reasonable time within which to deliver, but Martin, B., in delivering a dissentient judgment in the Court of Exchequer, which on the main point was upheld by the Exchequer Chamber, took the opposite view.

§ 217. The following propositions may fairly be deduced from the foregoing authorities where, in contracts for the delivery of goods by installments, there have been applications for ^{General} postponement of deliveries by seller or purchaser, and a subsequent tender of or request for delivery:—

(A.) Where the tender or request is *within the contract time*.

- (1) The defendant is bound to accept or deliver, although there has been postponement at the plaintiff's request. (*Tyers v. Rosedale Iron Co.*) (p)
- (2) It has not yet been decided whether the defendant is bound to accept or deliver all the quantities within the contract time, or only within some reasonable time afterwards, though the latter appears to be the better opinion. (*Tyers v. Rosedale Iron Co.*) (p)

(B.) Where the tender or request is *after the contract time*.

- (1) If the postponement has taken place at the *defendant's* request, he is estopped from denying that the plaintiff was ready and

(p) L. R., 10 Ex. 195, in Ex. Ch., reversing S. C., L. R., 8 Ex. 305.

willing to deliver or accept within the contract time. (*Ogle v. Earl Vane*, (q) *Hickman v. Haynes*.) (r)

(2) If the postponement has taken place at the *plaintiff's* request, he cannot maintain his action *on the original contract*, because he cannot prove that he was ready and willing to deliver or accept pursuant to the contract. (*Plevins v. Downing*.) (s)

(3) In the last case, if suing on a *substituted contract*, such contract must have been reduced to writing, in order to satisfy the statute of frauds. (*Plevins v. Downing*.) (s)

The contrary *dictum* of *Martin, B.*, in *Tyers v. Rosedale Iron Co.* (t) must, it is submitted, be considered as overruled in *Plevins v. Downing*. (s) (u)

Proof of approval, *after performance*, of a substituted mode of performance is a different thing from proof of a substituted contract, and may be given by parol. (*Leather Cloth Co. v. Hieronimus*.) (x)]

§ 218. Whether or not parol evidence is admissible to show a subsequent agreement for a waiver and abandonment of the whole contract, proven by a written note or memorandum under the statute, has not been decided, and the *dicta* on the subject are uncertain and contradictory. (y) Where, however, the agreement to rescind the first contract forms part of or results from a new parol agreement which itself is invalid, and cannot be enforced under the statute, it is held that the new parol agreement cannot have the effect of rescinding the first bargain. (z) ¹⁹

[It is a settled rule of equity that a contract required to be in writing to satisfy the statute may be rescinded by a parol agreement; and such rescission would be a sufficient defence to an action by either party for specific performance. (v)] ²⁰

(q) *L. R.*, 3 Q. B. 272, in *Ex. Ch.*, affirming *S. C.*, *L. R.*, 2 Q. B. 275.

(r) *L. R.*, 10 C. P. 593.

(s) 1 C. P. D. 220.

(t) *L. R.*, 8 *Ex.*, at p. 319.

(u) See interlocutory remarks of *Brett* and *Grove, JJ.*, 1 C. P. D., at p. 223.

(z) See remarks of *Blackburn, J.*, *L. R.*, 10 Q. B., at p. 146.

(y) *Dicta* of *Lord Denman* in *Goss v. Lord Nugent*, 5 B. & Ad. 65, and in *Harvey v. Grabham*, 5 Ad. & E. 61; of *Sir Wm. Grant* in *Price v. Dyer*, 17 Ves. 356; and of *Lord Hardwicke* in *Bell v. Howard*, 9 Mod. 305.

(s) *Moore v. Campbell*, 10 *Ex.* 323; and 23 *L. J.*, *Ex.* 310; *Noble v. Ward*, *L. R.*, 1 *Ex.* 117; *L. R.*, 2 *Ex.* 135, in error; 25 *L. J.*, *Ex.* 81.

19. *Buel v. Miller*, 4 N. H. 196; *Bowman v. Cunningham*, 78 Ill. 48; *Willey v. Hall*, 8 Iowa 62; *Cummings v. Arnold*, 3 Metc. 494; *Bryan v. Hunt*, 36 Tenn. L. 543; *Murray v. Harway*, 56 N. Y. 337; *Richardson v. Cooper*, 25 Me. 450; *Bird v. Munroe*, 65 Me. 337, 346.

(v) See *Fry on Specific Performance* (2d ed.), 1881, p. 445.

20. "Oral evidence is admissible to re-

§ 219. Parol evidence may be offered to show that a signature to a note or memorandum, though made by A in his own name, was really made in behalf of B, his principal, when the action is brought for the purpose of charging B; (w) ²¹ but it is not admissible in behalf of A in such a contract, for the purpose of showing that he is not personally bound, and had acted only as agent of B. (x) ²² Where the paper was signed "D. M. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was held admissible of a usage in such cases, that the brokers became personally liable. (y) [So, in a later case, where the contract was expressed to be made and was signed by the defendants "as agents to merchants," parol evidence was admitted of a usage by which the agent became

Where note is signed by agent in his own name.

form a written instrument, or to subvert or overthrow it entirely, but not to vary or alter it." *Van Fleet v. C.*, in *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233. See *Phelps v. Seely*, 22 Gratt. 573, 585.

(w) *Trueman v. Loder*, 11 Ad. & E. 589.

21. *Dykers v. Townsend*, 24 N. Y. 57; *Briggs v. Munchon*, 56 Mo. 467, 472; *Briggs v. Partridge*, 64 N. Y. 357, 362; *Chandler v. Coe*, 54 N. H. 561; *York County Bank v. Stein*, 24 Md. 447, 463; *Sanborn v. Flagler*, 9 Allen 474; 2 *Smith's Leading Cases* *358, *373.

The Seller may Sue for the Price on a Memorandum made by his Agent, and may Show by Parol the fact of Agency. — *Salmon Falls, &c., Co. v. Goddard*, 14 How. 446; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 381; *Hubert v. Borden*, 6 Whart. 79, 92; *Sanderson v. Lamberton*, 6 Binney 129; *Ford v. Williams*, 21 How. 287; *Stowell v. Eldred*, 39 Wis. 614; *York County Bank v. Stein*, 24 Md. 447, 464; *Huntington v. Knox*, 7 Cush. 371; *Hunter v. Giddings*, 97 Mass. 41. But in *Winchester v. Howard*, 97 Mass. 303, the agent represented a pair of oxen to be his own, when in fact they belonged to one with whom the buyer would have no dealings, and it was held

that the buyer might repudiate the sale on learning the truth. *Chapman, J.*, said: "Every man has a right to elect what parties he will deal with."

(x) *Higgins v. Senior*, 8 M. & W. 834; *Cropper v. Cook*, L. R., 3 C. P. 194; *Fawkes v. Lamb*, 31 L. J., Q. B. 98; *Calder v. Dobell*, L. R., 6 C. P. 486.

22. "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed the agency and mentioned the name of his principal at the time the contract was executed." *Clifford, J.*, in *Nash v. Towne*, 5 Wall. 689, 703; *Chandler v. Coe*, 54 N. H. 561, 575; *Titus v. Kyle*, 10 Ohio St. 444; *Mills v. Hunt*, 20 Wend. 431, 434; *Babbett v. Young*, 51 N. Y. 238, 242; 2 *Smith's Leading Cases* *358, *373.

(y) *Humfrey v. Dale*, 7 E. & B. 266; and 26 L. J., Q. B. 137; *E., B. & E.* 1004; 27 L. J., Q. B. 390; *Mollett v. Robinson*, L. R., 7 H. L. 802, reversing L. R., 5 C. P. 646; L. R., 7 C. P. 84; *Fleet v. Murton*, L. R., 7 Q. B. 126; *Southwell v. Bowditch*, 1 C. P. D. 374, C. A., reversing Id. 100. See, also, 2 Sm. L. C. (8th ed.) 377, for the authorities on this subject; and see *post* §§ 239, 241.

personally liable, if the principal's name was not disclosed within a reasonable time. (s)] And in *Wake v. Harrop* (a) (not under statute of frauds), it was held, that parol evidence was admissible to show that by *mistake* the written contract described the agent as principal, contrary to express agreement between the parties.

We may now proceed to the examination of this clause of the statute, dividing the inquiry into two sections:—

1. What is a note or memorandum in writing?
2. When is it a sufficient note of the bargain made?

SECTION I.—WHAT IS A NOTE OR MEMORANDUM IN WRITING?

§ 220. It may be premised that the note or memorandum must be one made and signed before the action brought. To satisfy the statute, there must be a *good contract* in existence at the time of action brought. (b) 23

Must be made before action brought.

But the statute does not require that the whole of the terms of the contract should be agreed to at one time, nor that they should be written down at one time, nor on one piece of paper; and accordingly it is settled, that where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the

Need not be written at one time nor on one piece of paper.

(s) *Hutchinson v. Tatham*, L. R., 8 C. P. 482.

(a) 6 H. & N. 768; 1 H. & C. 202; 30 L. J., Ex. 273; 31 L. J., Ex. 451.

(b) *Bill v. Bament*, 9 M. & W. 36. See remarks of Willis, J., in *Gibson v. Holland*, L. R., 1 C. P. 1; 35 L. J., C. P. 5.

23. The Memorandum Must be Signed Before Suit is Begun.—In *Bird v. Munroe*, 66 Me. 337, 347, Peters, J., said: "There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue." Quotes from *Philbrook v. Belknap*, 6 Vt. 383,

where it was said: "Strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it to enforce it." In *Phillips v. Ocmulgee Mills*, 55 Ga. 633, 636, Jackson, J., said: "If the contract be reduced to writing, signed by the party to be charged, any time before suit brought, it is enough; especially if dated by him at the time of the contract. It relates back and becomes part of the contract, and it does not matter that it was written and signed after the thing sold was destroyed, if there was no fraud in procuring the note, and if the party charging himself, knew the destruction of what he bought." See *Townsend v. Hargraves*, 118 Mass. 325, 336.

statute, provided the contents of the *signed* paper make such reference to the other written paper or papers, as to enable the court to construe the whole of them together as constituting all the terms of the bargain. And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*. But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute, *ante* § 210. ²⁴

Separate papers cannot be connected by parol.

§ 221. [But where the reference contained in the signed paper is ambiguous, parol evidence will be admitted to explain the ambiguity and identify the document to which the signed paper must and does refer. Thus, parol evidence was held admissible to identify the documents which were respectively referred to by the following ambiguous expressions: "instructions," (c) "terms agreed upon," (d) "purchase," (e)

Where reference is ambiguous, parol evidence admissible to show that a document is referred to and to identify it.

24. **Separate Papers Must be Connected by Reference in a Signed Writing.**—*Johnson v. Buck*, 35 N. J. L. 338, 343. In this case the conditions of sale were read at an auction, but the memorandum signed did not show price or terms. The conditions were offered to supply full evidence of the sale, but were rejected. Depue, J., said: "It is not essential that the whole bargain be contained in one memorandum. It will be sufficient if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former. The connection cannot be made by parol evidence that they were actually intended by the parties to be read together. The connection between them must appear by internal evidence derived from the signed memorandum." *Newton v. Bronson*, 13 N. Y. 587, 595; *Newbery v. Wall*, 65 Id. 484; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 24; *Oakman v. Rogers*, 120 Mass.

214; *McGuire v. Stevens*, 42 Miss. 724; *Fisher v. Kuhn*, 54 Id. 480; *Ide v. Stanton*, 15 Vt. 685; *Frank v. Miller*, 38 Md. 450; *Rhoades v. Castner*, 12 Allen 130; *Morton v. Dean*, 13 Metc. 385; *Lerned v. Wannemacher*, 9 Allen 417; *O'Donnell v. Leeman*, 43 Me. 158; *Smith v. Arnold*, 5 Mason 416; *Kaitling v. Parkin*, 23 U. C. C. P. 569. In *Ridgway v. Ingram*, 50 Ind. 145, a stricter rule is laid down than that of the text, holding that the court would not read an order of sale upon which the memorandum of sale was endorsed to ascertain the subject matter of sale, Worden, J., saying: "The memorandum endorsed upon the order of sale, but without any reference to it for the ascertainment of the thing sold, is no better than if it had been made on any other piece of paper." See *Jelks v. Barrett*, 52 Ind. 315.

(c) *Ridgway v. Wharton*, 6 H. L. C. 238.

(d) *Baumann v. James*, 3 Ch. 508.

(e) *Long v. Millar*, 4 C. P. D. 450, C. A.

Doctrine now
extended.

"our arrangement," (f) "purchased." (g) It is admitted, therefore, that since the decision in *Baumann v. James*, the principle of which case has been adopted in the most recent cases illustrating this subject, and cited in the notes *infra*, the rule as laid down by the earlier authorities must be taken to have been enlarged to the following extent: it is no longer necessary for the signed paper to refer to any unsigned paper as such; it is sufficient to show that a particular unsigned paper and nothing else can be referred to, and parol evidence is admissible for this purpose. In *Long v. Millar*. *Millar*, (h) where the same principle was carried even still further than in *Baumann v. James*, *Thesiger, L. J.*, on the question of the admissibility of parol evidence in these cases, says (at page 456): "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this submission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway v. Wharton*; there 'instructions' were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity."]²⁵

(f) *Cave v. Hastings*, 7 Q. B. D. 125.

(g) *Shardlow v. Cotterell*, 18 Ch. D. 280; 8 C. C., 20 Ch. D. 90, C. A.

(h) 4 C. P. D. 450.

25. An Ambiguous Reference in one Writing to another may be explained by Parol Evidence.—An illustration of an ambiguous reference to an agreement, identified by parol evidence, is found in *Beckwith v. Talbot*, 95 U. S. 289, 292. *Bradley, J.*, said: "It is undoubtedly a general rule that collateral papers adduced to supply the defect of signature of a written agreement, under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. There may be

cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt its enforcement would aid instead of discouraging fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day the latter writes to the party who signed it, as follows: 'My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it.' Would not this be a sufficient recognition, especially if the parties should

§ 222. Further, in order to satisfy the statute, when the memorandum relied on consists of separate papers, which it is attempted to connect by showing from their contents that they refer to the same agreement, these separate papers must be consistent and not contradictory in their statement of the terms, for otherwise it would be impossible to determine what the bargain was, without the introduction of parol testimony to show which of the papers stated it correctly. ^{Separate papers must be consistent.} 26

act under the agreement? And yet parol proof would be required to show what agreement was made." In this case the memorandum of the contract was signed by plaintiff alone, and given to defendant, and the contract was not to be performed within a year. But, subsequently, defendant wrote to plaintiff, and in his letter said he would keep his agreement about the cattle." Parol evidence was held properly admitted to show that the agreement referred to in the letter was the one given by plaintiff to defendant. It will be observed that Justice Bradley treats the admission of the parol evidence as an exception to the general rule excluding it, but a far more satisfactory explanation of it is that of Thesiger, L. J., in the text, *supra*, namely, that such testimony is offered to explain an ambiguity, or to apply a reference to its subject matter. See *ante*, § 211. See *Lee v. Mahony*, 9 Iowa 344. See, also, *Salmon Falls Manufacturing Co. v. Goddard*, 14 How. 446, 457, where the memorandum of sale was very meagre and did not show which party was buyer and which seller. The court held that a bill of parcels sent with the goods might be proved to supply any defects. Nelson, J., said: "Although we admit, if it was necessary for the plaintiffs to rely upon the bill as the note or memorandum within the statute, they must have failed, we think it competent, within the principle of the cases on the subject, from its connection with and relation to the contract, to refer to it as explanatory of any obscurity or

indefiniteness of its terms, for the purpose of removing the ambiguity. Take for example, as an instance, the objection that the price is uncertain, the figures 7½ opposite the three hundred bales given without any mark to denote what is intended by them. The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he orders the goods to be forwarded." Three justices dissented. *Salmon Falls, &c., Co. v. Goddard* is an extreme case, and in *Grafton v. Cummings*, 99 U. S. 100, 111, Justice Miller referring to it, said: "It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers, is sound law."

26. **The Separate Papers Must be Consistent.**—*Jenness v. Mount Hope Iron Co.*, 53 Me. 20. In *Phippen v. Hyland*, 19 U. C. C. P. 416, one memorandum of sale provided for delivery of goods "when called for," and the other for delivery "on Thursday." The court held that these provisions were not inconsistent, and that they were to be read as if in one paper, and the fair interpretation was that the goods must be delivered on Thursday, or sooner, if called for. In *Calkins v. Falk*, 1 Abb. App. Dec. 291, there were two signed notes of sale, in one of which the seller was named Falk, and in the other Falleck. The court, in the absence of proof, said it

§ 223. The authorities are believed to be quite consistent in maintaining these principles. In citing them, it will be observed, that some of the cases were under the fourth section of the statute, the language of which is, on this subject, almost identical with that of the seventeenth. The two clauses are here placed in juxtaposition for comparison.

Fourth and
seventeenth
sections com-
pared.

Fourth section.—"Unless the *agreement* on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the *party* to be charged therewith, or some other person thereunto by him lawfully authorized."

Seventeenth section.—"Except that some note or memorandum in writing of the said *bargain* be made, and signed by the *parties* to be charged with such contract, or their agents thereunto lawfully authorized."

It will be noticed hereafter that the question, whether there is any distinction in meaning between the respective words quoted in italics, viz., "*agreement*" and "*bargain*," on the one hand, and "*party*" and "*parties*," on the other hand, has been mooted on several occasions.

§ 224. The leading case in which it was held that the intention of the signer to connect two written papers, not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the present century.

Cases re-
viewed.

Hinde v. Whitehouse, (i) in 1806, was the case of a sale by auction. The auctioneer, who, as will be shown hereafter (*post*, Ch. VIII.), is by law an agent authorized to sign for both parties, had a catalogue, headed "To be sold by auction, for particu-

Hinde v.
Whitehouse.

could not say that these names were identical, and the memorandum was held insufficient; and the court further held that coincidence in place and date and terms was not evidence that they related to the same subject matter. But in *Thayer v. Luce*, 22 Ohio St. 62, 74, McIlvaine, J., said: "If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers which are not so signed; but if the several papers relied

on be signed by such party, it is sufficient, if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison. In this case, though no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms. The coincidences of names, dates, amount of purchase money and description are quite sufficient."

(i) 7 East 558; and see *Peirce v. Corf*, L. R., 9 Q. B. 210, *post*, § 229.

lars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to the catalogue was not sufficient to satisfy the statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms.

Kenworthy v. Schofield, (*k*) in the King's Bench in 1824, was decided in the same way, on circumstances precisely the same. Lord Westbury recently stated the general principle, in a case which arose under a similar clause in the railway and canal traffic act, in these words, "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument it refers to." (*l*) [Which refers to it?] ²⁷

Kenworthy v.
Schofield.

Peck v. North
Staffordshire
Railway
Company.

§ 225. The first reported case decided *in banc*, in which a signed paper referring to another writing was deemed sufficient to satisfy the statute, was that of Saunderson v. Jackson, (*m*) in 1800; but the case does not state how this connection between the two papers was made apparent, and can, therefore, give little aid in construing the clause of the statute, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper.

Saunderson v.
Jackson.

In Allen v. Bennett, (*n*) decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently, the defendant wrote to his agent, mentioning the plaintiff's name, and authorizing his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." Held,

Allen v.
Bennett.

(*k*) 2 B. & C. 945.

v. Buck, 35 N. J. L. 333, 345.

(*l*) Peck v. North Staffordshire Railway Company, 10 H. L. C. 472-569.

(*m*) 2 B. & P. 238.

(*n*) 3 Taunt. 169.

27. Quoted and approved in Johnson

that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain.

§ 226 In 1812, *Cooper v. Smith* (o) was distinguished from the foregoing case, because the letter offered to prove the contract, as entered on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. Le Blanc, J., tersely said, "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case." (p)

In *Jackson v. Lowe* and *Lynam*, (q) the Common Pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters, the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality, and the second from the defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month.

§ 227. *Richards v. Porter* (r) was decided in the King's Bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th of January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers.

A month later, on the 27th of February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23d of last month are not yet arrived, nor have I ever heard of them. *I received the invoice.* The last was much longer than they ought to have been on the road. However, if they

(o) 15 East 103.

(p) See *Haughton v. Morton*, 5 Ir. C. L. Rep. 329, where also it is stated by Crampton, J., at p. 342, that since the case of *Jackson v. Lowe*, *supra*, it is for the jury, in case of dispute, to decide

whether the signed does or does not refer to the unsigned document. And see on this *M'Mullen v. Helberg*, 4 L. R., Ir. 94, at p. 104.

(q) 1 Bing. 9.

(r) 6 B. & C. 437.

do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The plaintiff was nonsuited, and the King's Bench held the nonsuit right, Lord Tenterden saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the statute of frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the contract sufficient to satisfy the statute." The facts as reported certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plaintiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In the recent case of *Wilkinson v. Evans*,^(s) the judgment in *Richards v. Porter* is said to be reconcilable with the current of decisions by Erle, C. J., on the ground "that the letter stated that the contract contained a term, not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned Chief Justice to be contained in it. The decision in *Richards v. Porter* seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee. ^(t)

§ 228. The case of *Smith v. Surman* ^(u) followed in the King's Bench, in 1829. The written memorandum was con- Smith v. Surman. tained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased

(s) L. R., 1 C. P. 407; 35 L. J., C. P. 224. as expressed by Erle, C. J., in *Bailey v. Sweeting*, post, § 253.

(t) *Richards v. Porter* seems also irreconcilable with the opinion of the court (u) 9 B. & C. 561. See, also, *Archer v. Baynes*, 5 Ex. 625; 20 L. J., Ex. 54.

of him. * * * The val-
sum of £17 3s. 6d. I unde-
contract is on the ground tha
there is sufficient evidence to
and superior, &c., &c." The
received a letter from you
bought of him at 1s. 6d. per
some doubts whether it is or
now denies it." Held, that th
satisfy the statute. Bayley,
contract were is left in doubt,
mony. The object of the sta
exclude all doubt as to the t
not satisfied by defendant's l

§ 229. [Peirce v. Corf, (y)

Peirce v. Corf. out of a sale by a
auctioneer damag
ing contract for the sale of th
a sales' ledger, which was h
1872," in which the plainti
printed catalogue of the horse
nixed, was circulated, and the
bered forty-nine, but neither
annexed to the sales' ledger n
put up for sale and knock
thirty-three guineas. Thereu
columns of the sales' ledger,
the purchaser and the price
take the mare. Held, that
sufficiently connected to forn
statute. (z)]

§ 230. The leading case u

Boydell v. frauds, usually
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Drummond, (a) decided in

- (z) See Buxton v. Rust, L.
1; in Ex. Ch., Id. 279.
- (y) L. R., 9 Q. B. 210.
- (a) See, also, Rishton v. W

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 a third person, but where the consideration for ^{Wain v.}
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 the consideration was inadmissible under the statute, and the
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 Hutton v. Padgett, 26 Md. 228, and cases
 cited; Jones v. Palmer, 1 Doug. 379;
 Underwood v. Campbell, 14 N. H. 393;

of him. * * * The value, at 1s. 6d. per foot, amounts to the sum of £17 3s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior, &c., &c." The defendant replied, "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot, *to be sound and good*, which I have some doubts whether it is or not, but he promised to make it so, *and now denies it*." Held, that the letters were not consistent, and did not satisfy the statute. Bayley, J., said: "What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by defendant's letter." The other judges concurred. (x)

§ 229. [Peirce v. Corf, (y) which, like *Hinde v. Whitehouse*, arose out of a sale by auction, was an action to recover from an auctioneer damages for negligence in not making a binding contract for the sale of the plaintiff's mare. The defendant had a sales' ledger, which was headed "Sales by auction, 28th March, 1872," in which the plaintiff's mare was numbered forty-nine. A printed catalogue of the horses to be sold, with conditions of sale annexed, was circulated, and the plaintiff's mare was therein also numbered forty-nine, but neither the catalogue nor the conditions were annexed to the sales' ledger nor referred to therein. The mare was put up for sale and knocked down to one Thomas Macquire for thirty-three guineas. Thereupon the defendant's clerk wrote in the columns of the sales' ledger, left blank for the purpose, the name of the purchaser and the price. The purchaser afterwards refused to take the mare. Held, that the catalogue and sales' ledger were not sufficiently connected to form a memorandum sufficient to satisfy the statute. (z)]

§ 230. The leading case under the *fourth* section of the statute of frauds, usually cited in all disputes as to the construction of the words now under consideration, is *Boydell v. Drummond*. (a) decided in the King's Bench in 1809. The defend-

(x) See *Buxton v. Rust*, L. R., 1 Ex. Ch. D. 468.

1; in Ex. Ch., Id. 279.

(y) L. R., 9 Q. B. 210.

(z) See, also, *Rishton v. Whatmore*, 8

(a) 11 East 142. See, also, *Fitzmaurice v. Bailey*, 9 H. L. C. 78, and *Crane v.*

Powell, L. R., 4 C. P. 123.

ant was sued as one of the subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled "Shakespeare Subscribers, their Signatures." But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain, without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was nonsuited at Nisi Prius, and the nonsuit was confirmed by the unanimous opinion of the judges, Lord Ellenborough, C. J., Grose, Le Blanc, and Bayley, JJ.

In *Dobell v. Hutchinson*, (b) in 1835, the King's Bench held, under the fourth section of the act, that in a sale at auction where the letters of the defendants, the purchasers, referred distinctly to the conditions of sale signed by the plaintiff, and which they had in their hands, the clause of the statute was completely satisfied, because no parol evidence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases.

*Dobell v.
Hutchinson.*

So in *Laythoarp v. Bryant*, (c) in 1836, the Exchequer of Pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, the agreement having been written on the back of a paper containing the terms and conditions.

*Laythoarp v.
Bryant.*

§ 231. It has been held that the note or memorandum required by the statute need not be addressed to or pass between the parties, but may be addressed to a third person. In *Gibson v. Holland*, (d) decided in 1865, one of the pieces of paper relied on as constituting the written note of the bargain was a letter written by the defendant to his own agent. Held, to be sufficient by Erle, C. J., and Willis and Keating, JJ. This case was decided principally upon the authority of Sir Edward Sugden's "Treatise on Vendors and Purchasers," (e) in which he says: "A note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will (sub-

Note in writing may be addressed to a third person.

*Gibson v.
Holland.*

(b) 3 Ad. & E. 370.

(c) 2 Bing. N. C. 735.

(d) L. R., 1 C. P. 1; 35 L. J., C. P. 5.

(e) At p. 139, par. 39, in 14th ed. See, also, 1 Sm. L. C., p. 326, notes to *Birkmyr*

v. Darnell.

ject to the before-mentioned rules) be a sufficient agreement to take a case out of the statute," and on the authorities in the chancery reports there cited. 28

No case has arisen under the statute on the question whether the writing is required to be in ink, but there seems no reason to doubt that the common law rule would apply, and that a writing in pencil would be held sufficient to satisfy the seven-teenth section. (f) 29

Writing in
pencil.

SECTION II.—WHAT IS A SUFFICIENT NOTE OR MEMORANDUM OF THE BARGAIN MADE.

§ 232. After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is, whether the contents of the writing so proven form a sufficient note "of the bargain made."

So far as the fourth section of the statute is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In *Wain v. Warlters*, (g)

Fourth section
rigorously
construed.

28. **Memorandum Addressed to a Third Party may Suffice.**—*Gibson v. Holland* is cited and followed in *Peabody v. Speyers*, 56 N. Y. 230, where the subject of sale was gold, and a memorandum addressed to the Gold Exchange Bank, was held sufficient. In *Argus Co. v. City of Albany*, 56 N. Y. 495, a resolution of the common council of the city referring to a previous resolution, both entered on the minutes and signed by the clerk, was held a sufficient memorandum to bind the city. In *Johnson v. The Trinity Church*, 11 Allen 123, resolutions of a church society requesting the resignation of their minister, and mentioning the terms of his employment, were held to supply him with sufficient evidence to sustain his suit for salary on a contract not to be performed within a year, and a similar decision was made in *Tufts v. Plymouth Gold Mining Co.*, 14 Allen 407. In *Moore v. Mountcastle*, 61 Mo. 424, defendant had given plaintiff a letter of

introduction to a third party, and in it had mentioned the terms of a contract within the statute, and this letter was held a sufficient memorandum. In *Kleeman v. Collins*, 9 Bush 460, 467, Pryor, J., said: "If the agreement was evidenced by a memorandum in writing, signed by the party sought to be charged, although addressed in the form of a letter to his partner or agent, it was sufficient evidence of the agreement." See *Townsend v. Hargraves*, 118 Mass. 325, 335; *Barry v. Coombe*, 1 Pet. 640, 651.

(f) See *Geary v. Physic*, 5 B. & C. 234.

29. A pencil writing has been held sufficient in many cases in the United States. *Lee v. Mahoney*, 9 Iowa 344; *Clason v. Bailey*, 14 Johns. 484, 491; *Merritt v. Clason*, 12 Johns. 102, 106; *McDowell v. Chambers*, 1 Strob. Eq. 347. See, also, *Ryan v. Salt*, 3 U. C. C. P. 83, 87.

(g) 5 East 10.

which was the case of a promise in writing to pay the debt of a third person, but where the consideration for the promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the statute, and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties were to do, not the mere "promise" of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the statute required the whole "agreement," or some note or memorandum of it, to be in writing, the court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient to satisfy the statute. The judges were Lord Ellenborough, C. J., and Grose, Lawrence and Le Blanc, JJ.

Although this case was strongly controverted, chiefly in the courts of equity, as will be seen by reference to the argument of Taunton in the case of *Phillips v. Bateman*, (d) where he sums up all the objections to the decision, it was upheld and followed in subsequent cases, (e) and the law now remains settled as it was propounded in *Wain v. Walters*, except so far as guaranties are concerned, in relation to which the legislature intervened and made special provision in 19 and 20 Vict., c. 97, § 3, (Mercantile Law Amendment Act, 1856.) 30

(d) 10 East 356, at p. 374.

(e) *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 B. & B. 14; and *Lyon v. Lamb*, there cited at p. 22; *Morley v. Boothby*, 3 Bing. 107; *Fitzmaurice v. Bayley*, 9 H. L. C. 79. And see the authorities under the fourth section collected in Sugden's V. & P., p. 184, (14th ed.)

30. Can the Consideration be Shown by Parol Evidence? — The question whether the consideration must appear in writing to make a valid contract under the fourth section of the statute was raised in New York at an early day, and *Wain v. Walters* was followed repeatedly, until finally the law, as there established, was made statutory. *Sears v. Brink*, 3

Johns. 210; *Leonard v. Vredenburg*, 8 Id. 29; *D'Wolf v. Rabaud*, 1 Pet. 476. Before the New York statute requiring the consideration to be expressed, it was held that the consideration might be implied, as for instance from the words "for value received." The effect of the statute is to require the consideration to be stated in written contracts within the fourth section. *Bennett v. Pratt*, 4 Denio 275; *Mallory v. Gillett*, 21 N. Y. 412. *Wain v. Walters* has been followed with some qualification in many of the states. *Henderson v. Johnson*, 6 Ga. 390. But see *Hargroves v. Cooke*, 15 Ga. 321; *Hutton v. Padgett*, 26 Md. 228, and cases cited; *Jones v. Palmer*, 1 Doug. 379; *Underwood v. Campbell*, 14 N. H. 393;

§ 233. But under the 17th section of the statute the decisions have not maintained so rigorous a construction, and the judges have repeatedly referred to the distinction between the word "agreement" in the fourth section and "bargain" in the seventeenth. The cases will now be considered with reference exclusively to the contract of sale under the latter section, and to the inquiry whether, and to what extent, it is necessary that the writing should show, 1st, the names of the parties to the sale; 2ndly, the terms and subject matter of the contract.

Seventeenth section more liberally construed.

On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A does not bind him, save to the person to whom the promise was made, and until that person's name is shown it is impossible to say that the writing contains a memorandum of the bargain. ³¹

Names or descriptions of parties must be shown.

Buckley v. Beardslee, 5 N. J. L. 570, 573; Laing v. Lee, 20 N. J. L. 337; Taylor v. Pratt, 3 Wis. 674; Soles v. Hickman, 20 Penna. 180; Nichols v. Allen, 23 Minn. 542; Ellison v. Jackson Water Co., 12 Cal. 542. On the other hand, in Massachusetts, in the case of Packard v. Richardson, 17 Mass. 122, an exhaustive opinion was read, refusing to follow Wain v. Warlters, and holding that a promise is sufficient, though the consideration is not expressed in writing. This was followed in Maine and in many other states. Williams v. Robinson, 73 Me. 186, 195; Gillighan v. Boardman, 29 Me. 79, 81; Sage v. Wilcox, 6 Conn. 81; Patmor v. Haggard, 78 Ill. 607; Little v. Nabb, 10 Mo. 3; Ashford v. Robinson, 8 Ired. 114; Reed v. Evans, 17 Ohio 128; Smith v. Ide, 8 Vt. 290; Patchin v. Swift, 21 Vt. 292; Gregory v. Gleed, 33 Vt. 405; Dorman v. Richard, 1 Fla. 281; Gilman

v. Kibler, 5 Humph. 19; Colgin v. Henley, 6 Leigh 85; Ellett v. Britton, 10 Tex. 208; Wills v. Ross, 77 Ind. 1. Some of the foregoing decisions are founded on the use of the word "promise" in the statute interpreted, instead of the word "agreement," which is used in the English act.

31. The Writing must Show who the Parties are.—In Grafton v. Cummings, 99 U. S. 100, 107, it appeared that the purchaser of property at auction signed an agreement which did not mention the seller. Miller, J., said: "The name of the vendor, or some designation of him, which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity." See Beckwith v. Talbot, 95 U. S. 289; McConnell v. Brillhart, 17 Ill. 354, 360; Wood v. Davis, 82 Id. 311. In Sanborn v. Flagler, 9 Allen 474, the con

§ 234. In *Champion v. Plummer*, (f) the plaintiff, by his agent, wrote down in a memorandum-book the terms of a verbal sale to him by the defendant, and the defendant signed the writing, but the words were simply "Bought of W. Plummer, &c," with no name of the person who bought. Sir James Mansfield, C. J., said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. *It would prove a sale to any other person as well as to the plaintiffs.*"

In *Allen v. Bennett*, (g) the agreement was written in a book belonging to the plaintiff, and was signed by the defendant's agent. But the plaintiff's name was not in the book, and was not mentioned in the written memorandum. This was considered insufficient, but the defect was afterwards supplied by other writings showing the plaintiff to be the person with whom the bargain was made.

In *Williams v. Lake*, (h) which was under the 4th section, the defendant wrote a note binding himself as guarantor, and gave it to a third person for delivery. But the name of the person to whom the note was addressed was not written in the note. Held, by all the judges, insufficient to satisfy the statute, and this decision was approved and followed in *Williams v. Byrnes*, 1 Moo. P. C. C. (N. S.) 154.

In *Sarl v. Bourdillon*, (i) under the 17th section, the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient under the statute. 32

tract was to "deliver" to plaintiff certain iron. Bigelow, C. J., said: "It is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection if well founded. There can be no valid memorandum of a contract which does not show who are the contracting parties." But he says there is no such defect, for delivery of goods at a stipulated price constitutes a sale, and therefore an agreement to deliver to one

at a certain price imports a sale to him. *Williams v. Robinson*, 78 Me. 186, 195; *Sherburne v. Shaw*, 1 N. H. 157; *Mayer v. Adrian*, 77 N. C. 83, 89; *Flintoft v. Elmore*, 18 U. C. C. P. 274.

(f) 3 B. & P. 252.

(g) 3 Taunt. 169. See, also, *Cooper v. Smith*, 15 East 103, and *Jacob v. Kirke*, 2 M. & R. 222.

(h) 29 L. J., Q. B. 1; 2 E. & E. 349.

(i) 26 L. J., C. P. 78; 1 C. B. (N. S.) 188.

32. *Harvey v. Stevens*, 43 Vt. 653, was

Vandenburgh v. Spooner (*k*) was a case in which the facts were peculiar. The plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than £10. The defendant signed this memorandum, "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at the Lyme Cobb, at 1s. per foot." After the defendant had signed this document, he wrote out what he alleged to be a copy of it, which, at his request, the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenburgh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at 1s. the cubic foot, and a bill at one month." Held, that the note signed by the purchaser, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods so as to identify them, but did not mention the plaintiff as seller of the goods, and that the memorandum was therefore insufficient.

Newell v. Radford (*l*) was in the Common Pleas on these facts. The defendant was a flour-dealer, and the plaintiff a baker. The defendant's agent entered in the plaintiff's book the following words:—"Mr. Newell, 32 sacks, culasses, at 39s. 280 lbs. To await orders. John Williams."

The defendant insisted, on the authority of *Vandenburgh v. Spooner*, that as it was impossible to tell from this memorandum which was buyer and which was seller, the memorandum was insufficient, but the court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the baker was the buyer of the flour. There was also some correspondence referred to, showing who was the buyer and who the seller. 33

a case where the buyer's name was entered by the auctioneer's clerk with terms of sale in a book, on the cover of which was written "John Harvey's auction book," and this was held a sufficient designation of the seller on the authority of *Sarl v. Bourdillon* stated in the text.

(*k*) L. R., 1 Ex. 316; 35 L. J., Ex. 201.

(*l*) L. R., 3 C. P. 52; 37 L. J., C. P. 1.

33. The Writing must Show which

Party is Buyer and which is Seller.—

This statement seems to be sustained by authority, but as will be seen it has been controverted. *Bailey v. Ogdens*, 3 Johns. 399, 419, is the case usually cited in support of this proposition. There the memorandum of a sale merely stated two names, and terms and prices of a sale. Kent, C. J., said: "The memorandum is unintelligible. It has not the essentials of the contract or memorandum of a con-

§ 235. But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the statute. But if the writing shows by description with whom the bargain was made, then the statute is satisfied, and parol evidence is admissible to *apply the description*: that is, not to show with whom the bargain is made, but who is the person described, so as to enable the court to understand the description. This is no infringement of the statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject matter in controversy. ³⁴

Description of parties suffices instead of name.

§ 236. [The difficulty arises in determining upon the sufficiency of the description given in each particular case. There have been numerous decisions on this point. Thus, it was held by the present Master of the Rolls, in a case under the fourth section, that a vendor was sufficiently described by the term "proprietor," there being but one. ^(m) ³⁵ On the other hand, the description "vendor" was held by the same learned

"Proprietor."

"Vendor."

tract. No person can ascertain from it which of the parties was seller and which was buyer, nor whether there was any actual sale between them." See *Calkins v. Falk*, 1 Abb. App. Dec. 291, 294; *Nichols v. Johnson*, 10 Conn. 192, 199. In *Salmon Falls Manfg. Co. v. Goddard*, 14 How. 446, the memorandum was signed by both parties, but did not state which was buyer and which was seller; but the court held that "it was competent to show by parol proof that Mason signed for the firm of Mason & Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale." But there was an able dissenting opinion by Justice Curtis, and this case is doubted on this point in *Grafton v. Cummings*, 99 U. S. 100, 111. See, also, *Sanborn v. Flagler*, 9 Allen 474,

476. *Newell v. Radford*, cited in the text, was cited and followed in *Coate v. Terry*, 24 U. C. C. P. 571, and parol evidence was allowed to show which of two parties named was buyer and which seller.

³⁴ *Gowen v. Klous*, 101 Mass. 449; *Lang v. Henry*, 54 N. H. 57.

^(m) *Sale v. Lambert*, 18 Eq. 1; and *Rossiter v. Miller*, 46 L. J., Ch. 228; 5 Ch. D. 648, C. A.; S. C., 3 App. Cas. 1124, reversing the C. A. upon another point.

³⁵ *Sale v. Lambert*, cited by our author, was distinguished in *Grafton v. Cummings*, 99 U. S. 100, 110. A similar question which often arises in contracts made by agents is whether the designation of the principal is sufficient to exonerate the agent from personal liability. See § 241, note 42, *post*.

judge to be insufficient. (n) Again, when it appeared from conditions of sale that the vendors were a company in possession of the property, they were held to be sufficiently described; (n) and so when the vendor was stated to be "a trustee selling under a trust for sale." (o)

In every case there must be sufficient evidence to identify from the description, and, to use the language of the present Master of the Rolls, in *Commins v. Scott*, (p) "the court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury would not identify."]

§ 237. The cases in which this principle has been most clearly illustrated are those which arise in a very common course of mercantile dealing, where an agent signs a contract in his own name and without mentioning his principal.

It is settled that though in dealings of this kind it is not competent for the agent thus contracting to introduce parol proof to show that he did not intend to bind himself, because this would be to contradict what he had written, it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name. 36

Where agent signs his own name instead of principal's.

(n) *Potter v. Duffield*, 18 Eq. 4. See the *dicta* of the judges in *Thomas v. Brown*, 1 Q. B. D. 714, and the remarks of Jessel, M. R., dissenting therefrom in *Rossiter v. Miller*, reported in 46 L. J., Ch. 228, at p. 232.

(n) *Commins v. Scott*, 20 Eq. 11.

(o) *Catling v. King*, 5 Ch. D. 660, C. A. See, also, as to sufficiency of description of the property sold, *Shardlow v. Cotterell*, 20 Ch. D. 90, C. A., reversing S. C., 18 Ch. D. 280; *Beer v. London and Paris Hotel Co.*, 20 Eq. 412; *Thomas v. Brown*, 1 Q. B. D. 714; *Williams v. Jordan*, 6 Ch. D. 517.

(p) 20 Eq. at p. 16.

36. Parol Evidence is Admissible to Charge the Principal of an Agent Who Signs His Own Name.—In *Dykens v. Townsend*, 24 N. Y. 57, 61, Hoyt, J., said: "It seems to have been too long and too well settled that an

action can be maintained against a principal upon a contract for the sale of goods made by an agent in his own name, to be now [changed; and this, as well where the contract is within the statute of frauds, as where it is not." In *Wiener v. Whipple*, 53 Wis. 298, 302, Taylor, J., said: "Parol evidence is admissible to show the fact of agency, in order to charge the principal, notwithstanding the writing is executed by the agent in his own name. The signature of the agent in such case is deemed the signature of the principal, and is a sufficient signing to take the case out of the statute." See *Meeker v. Claghorn*, 44 N. Y. 349; *Jessup v. Steurer*, 75 N. Y. 613; *Hill v. Miller*, 76 N. Y. 32. In *Perth Amboy Manuf. Co. v. Condit*, 21 N. J. L. 659, 664, in Court of Errors, Carpenter, J., said: "A principal cannot avoid his legal liabilities by directions to his agent

[But a commission agent acting here for a foreign principal is not, in the absence of express authority, entitled to pledge the foreign principal's credit. In such a case the agent renders himself personally liable, and the foreign principal cannot sue or be sued upon the contracts entered into by the agent. (q) This apparent exception to the rule arises from the real character of the relationship existing between the commission agent and his foreign constituent, a relationship which in its nature and effects is one of vendor and vendee, and not one of principal and agent. (r) ³⁷ Thus it is that the commission agent may exercise the

Agent for
foreign prin-
cipal.

to keep the purpose of his purchases a secret. When the agency is disclosed, the vendor, who has sold in ignorance thereof, may then elect whether he will resort to the agent or the principal." See *ante* § 219, note 21. But the undisclosed principal and the agent cannot be sued together; an election must be made. *Brainard v. Turner*, 4 Ill. App. 61.

Effect of Accepting the Signature of an Agent Known to be Such.—A distinction has been made between those cases where the party dealing with an agent, and accepting his signature, knows that he is such, and those where he does not, as to the principal's liability. In *Chandler v. Coe*, 54 N. H. 561, 575, *Hibbard, J.*, said: "We are of the opinion that where a principal is sought to be charged upon a contract in writing, made in the name of his agent, the rule of evidence which prohibits the parties to a written contract from contradicting or varying its terms by parol testimony, applies, if the principal was known, but not if he was unknown." The theory of this principle is that when a party accepts the agent's signature, he elects to hold the agent instead of the principal. Where an agent contracts in his own name under seal, the party accepting such contract

cannot resort to an undisclosed principal. *Mahoney v. McLean*, 26 Minn. 415.

37. Is an Agent Dealing for a Foreign Principal Personally Liable?—The law stated in the text is not the law in the United States. The question arose in the New York Court of Errors and Appeals, in *Kirkpatrick v. Stainer*, 22 Wend. 244, 263, and, after a full discussion, Senator Verplanck, giving the opinion of the majority of the court, said: "No usage or course of business analogous to that prevalent in England, being notorious or well established by former evidence as existing here, and no proof having been offered of any special or local usage, or common understanding, charging the agent alone, and not his foreign principal, for purchases or contracts made avowedly for such known principal, the case must be governed by the general law as to the contracts of a private agent, clothed with full authority and acting openly in behalf of his principal." In *Taintor v. Prendergast*, 6 Hill 72, the plaintiff, who lived in Connecticut, sued in New York on a contract made by his agent in his own name for the purchase of goods in New York. *Monell, J.*, said that no doubt the agent would be liable personally on such contract, and, in the

(q) *Armstrong v. Stokes*, L. R., 7 Q. B. 598, *per cur.*, at p. 605; *Elbinger Co. v. Claye*, L. R., 8 Q. B. 313; *Hutton v. Bullock*, *Ibid.* 331, affirmed in Ex. Ch.,

L. R., 9 Q. B. 572.

(r) See the opinion of *Blackburn, J.*, in *Ireland v. Livingston*, L. R., 5 H. L. at p. 408.

right of stoppage *in transitu* upon the insolvency of his foreign constituent. See *post*, Book V., Part I., ch. V., § 1, *Stoppage in Transitu*.

In *Trueman v. Lodor*, (s) the defendant was sued on a broker's sold note in these words: "London, 28th April, 1835. Sold for Mr. Edward Higginbotham, &c., &c." The proof was, that in 1832 the defendant, a merchant of St. Petersburg, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit under his instructions. The case was argued by very able counsel in Michaelmas Term, 1838, and the judges took time to consider till the ensuing term, when Lord Denman delivered the opinion of the court, composed of himself, and Patteson, Williams and Coleridge, JJ. On the question made, that the name of the defendant was not in the written contract, the court said: "Among the ingenious arguments pressed by the defendant's

absence of a custom to the contrary, his principal, when discovered. "On the other hand, I am still in want of an authority that where an agent acquires rights in a course of dealing for his principal, whether the latter be foreign or domestic, and his name is kept secret, the principal may not sue to enforce those rights. I admit that defendant is not, by such form of action, to be cut off from any equities he may have against the agent. So far, the latter is considered as the exclusive principal, but no farther." In *Oelrichs v. Ford*, 23 How. 49, 64, the suit was brought by a resident of New York upon a sale made by his agent to a resident of Maryland. The court sustained the right to sue, citing the above cases. In *Bray v. Kettell*, 1 Allen 80, 83, Bigelow, C. J., after referring to the English rule, and to *Story on Agency*, §§ 288, 290, where it is adopted, said: "The more reasonable and correct doctrine is, that when goods are sold to a domestic agent, or a contract is made by him, the fact that he acts for a foreign

principal is evidence only that the agent and not the principal is liable. It is in reality, in all cases, a question to whom the credit was in fact given." See *Haley v. Merriam*, 7 Cush. 242; *Barry v. Page*, 10 Gray 398. But in the case of *Merrick's Estate*, 5 W. & S. 9, 14, Rogers, J., said: "The case falls within the exception of foreign factors; where exclusive credit is given to and by the agent, the principal cannot be treated as, in any manner whatsoever, a party to the contract, although he may have authorized it, or be entitled to the benefit of it." See, also, *McKenzie v. Nevius*, 22 Me. 138; *Rogers v. March*, 33 Me. 106. In *Vawter v. Baker*, 23 Ind. 63, it is held that the states of the Union are not foreign to each other in any such sense as to render applicable the English rule that an agent is liable for his contracts on behalf of a foreign principal. See this subject discussed in 13 Am. Law Review 663.

(s) 11 Ad. & E. 587.

counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own. (t)

§ 238. The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving that he did not intend to bind himself, but only his principal, is *Higgins v. Senior*, (u) decided in the Exchequer in 1841, in which also the judges took time to consider until the ensuing term, when Parke, B., delivered the judgment of the court, composed of himself and Alderson, Gurney and Rolfe, BB. The opinion states the question submitted to be, "Whether in an action or an agreement in writing, purporting on the face of it to be made by the defendant, and to be subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when this agreement was made and signed." Held, in the negative. The learned Baron then proceeded to lay down the principles on which this conclusion was reached, as follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing, by the statute of frauds:

When agent
is personally
responsible.

*Higgins v.
Senior.*

(t) See, also, 2 Sm. L. C., (ed. 1879,) in P. 486, 499.
notes to *Thompson v. Davenport*, p. 407, (u) 8 M. & W. 834.
at seq.; and *Calder v. Dobell*, L. R., 6 C.

and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

"But, on the other hand, to allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." (x) 38

§ 239. Where the broker bought expressly for his principals but without disclosing their names in the sold note, he was held liable to the vendor on evidence of usage that the broker was liable personally when the name of the principal was not disclosed at the time of the contract. (y)

In *Fleet v. Murton*, (z) the contract note was, "We have this day sold for your account to our principal," (Signed) M. & W., Brokers; and the brokers were held personally liable on proof of usage of the trade to the same effect as that given in *Humfrey v. Dale*. (y)

[And in *Hutchinson v. Tatham*, (a) where the defendants acting as agents for one Lyons had chartered a ship, and the charter-party was expressed to be made, and was signed by them as "agents to merchants," without disclosing the name of

(z) See 2 Sm. L. C., p. 404, in notes to *Thompson v. Davenport*, where the whole subject is more fully treated than comports with the design of the present treatise.

38. An Agent who Contracts in Writing as Principal, cannot Exonerate himself by proving his Agency.—See *ante* § 219, note 22; *Chandler v. Coe*, 54 N. H. 561, 576; *Ford v. Williams*, 21 How. 207; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388; *Meeker v. Claghorn*, 44 N. Y. 349, 351. In this case *Earl, C.*, said: "If the defendants were not known to be the principals, and credit was at the time given to their undisclosed agent, then the vendors could hold for payment at their election either the agent or the principals. See *Weston*

v. McMillan, 42 Wis. 567; *Welch v. Goodwin*, 123 Mass. 71; *McClellan v. Parker*, 27 Mo. 162; *Schell v. Stevens*, 50 Mo. 375; *Beymer v. Bonsall*, 79 Penna. 298; *Cobb v. Knapp*, 71 N. Y. 348; *Knapp v. Simon*, 86 N. Y. 311; *Nixon v. Downey*, 49 Iowa 166; *Rushing v. Seebree*, 12 Bush 198; *Quigley v. De Haas*, 82 Penna. 267, 273; *Foster v. Smith*, 42 Tenu. 474; *Wheeler v. Reed*, 36 Ill. 81, 89.

(y) *Humfrey v. Dale*, 7 E. & B. 266; E. B. & E. 1004; 26 L. J., Q. B. 137; 27 L. J., Q. B. 390. See, also, *Tetley v. Shand*, 20 W. R. 206; 25 L. T. (N. S.) 658.

(x) L. R., 7 Q. B. 126.

(a) L. R., 8 C. P. 482.

their principal. It was held, in an action by the ship-owners on the authority of *Humfrey v. Dale* and *Fleet v. Murton*, that evidence was admissible of a custom whereby the broker became personally liable when the principal's name was not disclosed within a reasonable time.

According to the custom of the London Dry Goods Market, a broker, who contracts for the sale of goods without disclosing the name of his principal, becomes personally liable on his principal's default.] (b)

§ 240. In *Mollett v. Robinson*, (c) the circumstances were these: The plaintiffs, tallow brokers, were employed by the defendant to purchase 50 tons of tallow in the London market; and had like orders from other purchasers. The plaintiffs bought in their own names, without disclosing their principals, tallow enough for all the orders which they had received, and divided it among the principals who had employed them,—sending to the defendant a bought note, signed by themselves as “sworn brokers,” stating 50 tons of tallow to have been bought “for his account,” with quality, price, &c., but no vendor's name given. There was no corresponding sold note delivered to any one, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage of the London market: but the defendant was not aware of the usage, and refused to accept the tallow when he learned how the business had been conducted. Held, in the Common Pleas, by Bovill, C. J., and Montague Smith, J., that the defendant was bound to accept: by Willes and Keating, JJ., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale to the defendant without the latter's consent, and there was no other principal than the plaintiffs. In the Exchequer Chamber, Kelly, C. B., Channell, B., and Blackburn, J., agreed in opinion with Bovill, C. J., and Smith, J., while Mellor and Hannen, JJ., and Cleasby, B., were of the opposite opinion.

[The judgments of the Court of Common Pleas and of the Exchequer Chamber were unanimously reversed by the House of Lords. (d) It is now, therefore, settled law that when the usage of

(b) *Imperial Bank v. London and St. Katharine's Dock Co.*, 5 Ch. D. 195.

(c) L. R., 7 H. L. 802, reversing S. C., L. R., 7 C. P. 84, and L. R., 5 C. P. 648.

(d) L. R., 7 H. L. 802. *sub nom.* Rob-

inson v. Mollett. Of the judges summoned by the House, who had not previously expressed an opinion on the case, Brett and Grove, JJ., dissented from, and Amphlett, J., supported the judgments.

trade set up is such as goes to alter the *intrinsic character* of the contract, as *e. g.*, in *Mollett v. Robinson*, by converting a broker, employed to buy for his employer, into a principal to sell to him, (e) such usage will not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him on the particular market where it prevails.] (f)

§ 241. Where a broker gives a contract note describing himself as acting for a named principal he cannot sue personally on the contract. (g) And *semble*, not even if principal was undisclosed. (h) 39

In what cases
broker can sue
or be sued
personally.

But if the broker contract in his own name, even though he is known to be an agent, he may sue or be sued on the contract. (i) And the same rules apply to auctioneers. (j) 40

of the court below. The opinion of Brett, J., will well repay perusal.

(e) As to which see *Waddell v. Blockey*, 4 Q. B. D. 678, C. A., and *per cur.* in *De Bussche v. Alt*, 8 Ch. D. 286, C. A.

(f) See *per Lord Chelmsford* in *L. R.*, 7 H. L., at p. 836.

(g) *Fawkes v. Lamb*, 31 L. J., Q. B. 98; *Fisher v. Marsh*, 6 B. & S. 416, *per Blackburn, J.*, 34 L. J., Q. B. 178; *Bramwell v. Spiller*, 21 L. T. (N. S.) 672; *Fairlie v. Fenton*, L. R., 5 Ex. 169.

(h) *Sharman v. Brandt*, L. R., 6 Q. B. 720, in Ex. Ch.

39. An Agent Cannot Sue on a Sale Avowedly for His Principal, Unless He has a Special Interest in the Goods Sold.—A distinction is made between agents having the possession coupled with some special interest in goods, and those merely employed to make sale. The former can sue, the latter cannot. In *White v. Chouteau*, 10 Barb. 202, 208, plaintiffs sold some indigo, not giving the owner's name, but stating that they were brokers. *Held*, that as they had no special interest in the goods they could not sue. "In none of the cases has the right to sue in his own name been extended to a mere ordinary broker." In *Buckbee v. Brown*, 21 Wend. 110, it was held that a dock-master appointed by a municipal corporation to collect

dues could not sue for them in his own name. And see *Dugan v. United States*, 3 Wheat. 172. But factors, auctioneers intrusted with goods, and other agents having a personal interest, may sue. *Kent v. Bornstein*, 12 Allen 342; *Graham v. Duckwall*, 8 Bush 12; *Minturn v. Wain*, 7 N. Y. 220; *Beller v. Block*, 19 Ark. 566.

An Agent is not Liable if He Contracts as such, Unless Credit is Given to Him Expressly.—*Whitney v. Wyman*, 101 U. S. 392. In this case a committee of a company not yet completely organized, ordered, "by direction of the officers," certain machinery, which was sent and accepted by the company afterwards organized. The members of the committee being sued, it was held that they were not liable. See § 246, and note 44, *post*. *Watson v. Rickard*, 25 Kan. 662; *Gill v. Tison*, 61 Ga. 161; *Fleming v. Hill*, 62 Ga. 751.

(i) *Short v. Spakeman*, 2 B. & Ad. 962; *Jones v. Littledale*, 6 Ad. & E. 486; *Reid v. Draper*, 6 H. & N. 813, 30 L. J., Ex. 268.

(j) *Franklyn v. Lamond*, 4 C. B. 637; *Fisher v. Marsh*, 6 B. & S. 411; 34 L. J., Q. B. 177; *Woolfe v. Horne*, 2 Q. B. D. 355.

40. See *ante* § 238, note 38. *Mills v.*

And if the broker, though signing as broker, be really the principal, his signature will not bind the opposite party, (h) and he cannot sue on the contract. (h) 41

Where a person describes himself as agent in the body of the contract but signs his own name, he is personally liable on the contract. (k) 42

Hunt, 20 Wend. 433; Cobb v. Knapp, 71 N. Y. 348; Raymond v. Crown and Eagle Mills, 2 Metc. 39; Guernsey v. Cook, 117 Mass. 548. In Roosevelt v. Doherty, 129 Mass. 301, a factor sold goods of his principal in one lot with his own goods, and it was held that the factor possessed the sole right of action. Schell v. Stephens, 50 Mo. 375; Blakely v. Bennecke, 59 Mo. 193; Groover v. Warfield, 50 Ga. 644; Bedford, &c., Ins. Co. v. Covell, 8 Metc. 442; Taber v. Cannon, 8 Id. 456, 460.

41. **An Agent Who Contracts Without Authority is Liable for Breach of his Warranty of Authority.**—It was formerly held that an agent who made a contract for a known principal without authority, was liable as principal on such contract. Walker v. Bank of New York, 9 N. Y. 582, 585; Weare v. Gove, 44 N. H. 196; Coffman v. Harrison, 24 Mo. 524; Byars v. Doore's Adm'r, 20 Id. 284; Foster v. Smith, 42 Tenn. 474, 479; Bay v. Cook, 22 N. J. L. 343, 352. But the later doctrine is that the remedy is either by action on the case for deceit, or by action for breach of an implied warranty that he has authority. Baltzen v. Nicolay, 53 N. Y. 467; Bartlett v. Tucker, 104 Mass. 336; Noyes v. Loring, 55 Me. 408; Sheffield v. Ladue, 16 Minn. 338; White v. Madison, 26 N. Y. 117; Dung v. Parker, 52 N. Y. 494, 500; Johnson v. Smith, 21 Conn. 627; Duncan v. Niles, 32 Ill. 532.

Where one Deals with an Agent Knowing his Authority, he cannot hold the Agent Liable if it Proves In-

sufficient.—There is an important exception to the principle first stated in this note to be noticed. Where the agent and the party with whom he deals, both knowing what the authority of the agent is, through ignorance of the law, enter into a contract beyond his authority, the agent incurs no liability. Thus in Abeles v. Cochran, 25 Kans. 405, 414, plaintiff sued the directors of a bank on a contract which he had made with them to sell to their bank one thousand shares of its own stock. The directors had no authority to make such a purchase. Brewer, J., said: "The doctrine is clear that where the contract is made in the name of the principal, and without any personal covenant on the part of the agent, and without any wrong on his part either in act, statement or omission, the latter is not responsible, even though the former be not bound." Watson v. Rickard, 25 Kan. 662; Aspinwall v. Torrance, 1 Lans. 381; Ogden v. Raymond, 22 Conn. 384; Walker v. Bank, 9 N. Y. 582, 587; Newman v. Sylvester, 42 Ind. 106, 112; Sanborn v. Neal, 4 Mimm. 126; Murray v. Carothers, 1 Metc. (Ky.) 71; McCurdy v. Rogers, 21 Wis. 199; Mann v. Richardson, 66 Ill. 481. But if the agent has received and retains property, suit may be brought against him to recover it. Jefts v. York, 10 Cush. 392. These cases must be distinguished from those where the agent represents himself as acting for a principal who in fact has no existence, as to which see § 246, note.

42. **What Words Sufficiently Ex-**

(h) Sharman v. Brandt, L. R., 6 Q. B. 720, in Ex. Ch.

(k) Paice v. Walker, L. R., 5 Ex. 173,

and cases there cited; but see Thomson v. Davenport, notes to 2 Sm. L. C., p. 398 (ed. 1879.)

§ 242. [This is the effect of the decision in *Paice v. Walker*, (l) where the sellers described themselves in the body of the contract "*as agents for*" named principals, but signed their own names, and were held to be personally liable on the contract. (m) But in *Gadd v. Houghton*, (n) where brokers had given the purchaser a sold note in the following terms: "We have this day sold to you *on account of* John Morand & Co., Valencia, 2000 cases Valencia oranges, &c.," and signed it without any qualification, the Court of Appeal held that they were not liable. *Paice v. Walker* was distinguished on the ground that the *ratio decidendi* there was that the words "*as agents*" were words of description only, and were not equivalent to a declaration by the defendants that they were making a bargain on another's account, but James, L. J., in commenting upon *Paice v. Walker*, said, "If that case were now before us, I should hold that the words '*as agents*' in that case had the same effect as the words '*on account of*' in the present case, and that the decision in that case ought not to stand." (n)

press the Fact of Agency.—In *Simonds v. Heard*, 23 Pick. 120, a committee appointed by a town to build a bridge, and furnished with money, were held personally liable on a contract for building, in which they described themselves as committee of the town of Wayland, but signed their individual names. And in *Bayliss v. Pearson*, 15 Iowa 279, a committee to erect a school-house signed a note with their individual names, wherein they "*as committeemen*" to erect the school-house, designating it, promised to pay; and they were held individually liable. But in most cases in the United States a statement of the fact of agency in the body of the instrument has been held more satisfactory evidence of intent to bind the principal than the addition of the term "*agent*" after the name, which latter designation has sometimes been held mere description. In the case of *Pratt v. Beaupre*, 13 Minn. 187, a contract to transport flour was signed "*Temple & Beaupre, agents steamer Flora*." *McMillan, J.*, said that the words "*agents, &c.*" were *prima facie* descriptive of the

person. "When a party who seeks to change the *prima facie* character of the contract, does so on the ground of agency in making the contract, the fact of his agency must be established; for if he acted as an agent without authority, he is personally liable." In *Hayes v. Brubaker*, 65 Ind. 27, a note was sued on, signed by defendants, who added to their names "*Trustees of Univ. Church of Pierceton*." It was held incompetent to prove that they were agents for the church, and judgment was sustained against them. *Tilden v. Barnard*, 43 Mich. 376, is to the same effect. See *Cruse v. Jones*, 3 Lea (Tenn.) 66; *Bryson v. Lucas*, 84 N. C. 680; *Lacy v. Dubuque Lumber Co.*, 43 Iowa 510; *Anderton v. Shoup*, 17 Ohio St. 125; *De Witt v. Walton*, 9 N. Y. 571. (l) L. R., 5 Ex. 173, and see *Adams v. Hall*, 37 L. T. (N. S.) 70; and *Weidner v. Hoggett*, 1 C. P. D. 533.

(m) As to the principal's liability in such a case, see *The Concordia Chemical Co. v. Squire*, 34 L. T. (N. S.) 824, C. A.

(n) 1 Ex. D. 357, C. A.

(n) 1 Ex. D., at p. 359.

In *Ogden v. Hall* (o) the words used were "*on behalf of*," and it was held by the Exchequer Division (diss. Kelly, C. B.,) ^{Ogden v. Hall.} that the case was governed by *Gadd v. Houghton*, on the ground that the import of the expressions "*on account of*" and "*on behalf of*" was identical.

In *Hough v. Manzanos*, (p) Pollock, B., followed *Paice v. Walker*, stating that he was unable to appreciate the distinction drawn by James, L. J., in *Gadd v. Houghton*, between the ^{Hough v. Manzanos.} expressions "*as agent for*" and "*on account of*" principals, but that that distinction left *Paice v. Walker* an authority binding upon him. The correctness, however, of the decision in *Paice v. Walker* remains questionable.

In *Southwell v. Bowditch*, (q) it was held that a broker who had signed and sent to the plaintiff a contract note in the following terms: "I have this day sold by your order ^{Southwell v. Bowditch.} and for your account, *to my principals*, 5 tons of anthracene (Signed) W. H. Bowditch," was not, *in the absence of usage*, personally liable on the contract.]

§ 243. An extremely able discussion of the subject of a broker's responsibility is found in the remarkable case of *Fowler v. Hollins*. (r) The facts were that the plaintiffs, after ^{Fowler v. Hollins.} refusing to sell to a broker personally, sold thirteen bales of cotton to him on his stating that he was acting for a principal, and the sale note was made to the principal. This was a fraud of the broker who had no authority from the principal, and the broker immediately resold the cotton for cash to the defendants who were also brokers, and were really acting for principals, (s) but who took a purchase note in their own names, addressed to themselves as follows: "We sell you, &c." The defendants on the same day sent a delivery order for the cotton in favor of their principals, whom they named in the order, and paid for it. They were re-imbursed the price by their principals, together with their commissions and charges. All these transactions took place on the 23d of December, 1869. The cotton was at once sent by the defendants to the railway station, whence it

(o) 40 L. T. (N. S.) 751.

(p) 4 Ex. D. 104.

(q) 1 C. P. D. 374, C. A., reversing the decision of the Divisional Court, Id. 100.

(r) L. R., 7 Q. B. 616.

(s) This is not quite correct. At the time of the sale by Bayley, the fraudulent broker, to them, the defendants had no principals. See *post* § 245.

was taken to the mills of the principals at Stockport, and there manufactured into yarn.

On the 10th of January, 1870, the defendants received a letter from the plaintiffs stating the fraud that had been committed on them, and demanding delivery back to themselves of the cotton. This was the first intimation to the defendants that any fraud had been committed on the plaintiffs, and they replied to the plaintiffs' demand, saying: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your clients any assistance."

The plaintiffs thereupon brought trover, and it was left to the jury by Willes, J., to say whether the defendants had acted only as agents in the course of the business, and whether they had dealt with the goods only as agents for their principals. The jury found these facts in favor of the defendants, and a verdict was entered for them with leave reserved to the plaintiffs to move to enter a verdict for the value of the thirteen bales. The rule was made absolute in the Queen's Bench (Mellor, Lush, and Hannen, JJ.); and in the Exchequer Chamber, the judgment was affirmed by Martin, Channell, and Cleasby, BB. (diss. Kelly, C. B., and Byles and Brett, JJ.)

The reason given for affirming the judgment was, that although the defendants had acted as brokers, they had assumed the responsibility of principals by dealing in their own names for an undisclosed principal, Martin and Channell, BB., being also of opinion that the plaintiffs were entitled to recover whether the defendants had acted as principals or agents, and that the "facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley [the fraudulent broker], whether it was to the defendants or to Micholls. I think they are entitled to treat the defendants as wrong-doers, wrongfully intermeddling with their cotton, which they had no legal right to touch: and that when they removed the cotton from the warehouse where it was deposited to the railway station, to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a conversion." Per Martin, B., pp. 634-5.

§ 244. Brett, J., on the other hand, delivered a powerful judgment, which the Chief Baron characterized as "logical and exhaustive," and in which both he and Byles, J., concurred. The following passages are extracted as a very instructive exposition of the subject

under consideration: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as *his*, but only because it is in contemplation of law the signature of *one or both of the principals*. No effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing, he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other. He is throughout merely the negotiator between the parties; and, therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there was some fraud on their part. Story on Agency, § 30. And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a document [*i. e.*, the delivery order], without

any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf, or on behalf of any one else. Obedience or disobedience to the contract, and its effects upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and is no way within his cognizance. Under such circumstances, and so far it seems to me clear, that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say, that for such a delivery he could be held liable by the real owner of the goods for a wrongful conversion. But then in some cases, a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfillment of it. But so, also, may his undisclosed principal; and, although the agent *may be liable upon the contract*, yet I apprehend *nothing passes to him by the contract*. The goods do not become his. He could not hold them even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be property of his principal. And although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable *as a contractor on the contract*, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor—even though the contract should be in a form which passes property in goods by the contract itself—by a *third person*, as if he, the broker, were the owner of the goods; as if, for instance, the goods were a nuisance or an obstruction, or as it were trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal till then undisclosed. If he could not be sued *for any other tort*, merely on the ground that he had made

the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely *on that ground* by the real owner of the goods, as for a wrongful conversion of the goods to his own use." The learned judge then, after a review of the authorities upon the subject of conversion, (t) further held that the mere *asportation* of the goods through the agency of the defendants *before knowledge* of the plaintiffs' claim or rights was not sufficient to constitute a conversion, because unaccompanied with any *intention* to deprive the plaintiff of the goods, though that asportation would have been a conversion, if made *after* notice of the plaintiff's claim.

§ 245. [This case was carried on appeal to the House of Lords, (u) and the judges were summoned. Of the learned judges who attended, the majority (Blackburn, Mellor, and Grove, JJ., and Cleasby, B.) were in favor of affirming the decision of the courts below, while Brett, J., again delivered a dissentient opinion, in which Amphlett, B., concurred. Their lordships unanimously affirmed the judgments of the Court of Queen's Bench and of the Exchequer Chamber. Some difficulty arose in considering the effect which ought to be given to the findings of the jury at the trial. The jury had found, as we have already seen, that the cotton was bought by the defendants *as agents in the course of their business as brokers*, and that they had dealt with it only as agents to their principals. In point of fact the defendants had no principals at the time when they purchased the goods, although they intended them for Micholls & Co.; but it was only after the completion of the contract that Micholls & Co. adopted it. There was evidence at the trial that in the course of their business, as brokers, the defendants purchased cotton in the expectation of being able to find a client to take it off their hands, although they never intended to retain the goods as principals, but to pass them on to the purchaser when found, receiving their brokers' commission on the sale. All their lordships explained the findings of the jury with regard to this course of dealing, (x) and held that as the defendants had at the time of the sale assumed the responsibility of principals, they had by the transfer of the goods to Micholls & Co., exercised an

(t) See on conversion, *Stephens v. Ell-wall*, 4 M. & S. 259; *Hardman v. Booth*, 1 H. & C. 103; both of which cases were approved and followed by the House of Lords in *Hollins v. Fowler*, *supra*; and see *England v. Cowley*, L. R., 8 Ex. 128.

(u) L. R., 7 H. L. 757; reported *sub nom.* *Hollins v. Fowler*.

(z) Per Lord Chelmsford, at p. 794; per Lord Cairns, at p. 796; per Lord Hatherley, at p. 798; per Lord O'Hagan, at p. 800.

act of dominion over them which was inconsistent with the right of the plaintiffs, the true owners, to whom therefore they were liable for conversion.⁴³

Lord Cairns says (at p. 797,) "I agree with what is said by Mr. Justice Grove, that the jurors appear to have meant that the appellants never bought intending to hold or to make a profit, but with a view to pass the goods over to Micholls & Co., or, if Micholls & Co. did not accept them, to some other customer, and that therefore, in one sense, they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods, or dealing with them as buyers and sellers. But, as Mr. Justice Grove continues, 'this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act and did act, in one respect, as brokers, not making a profit by re-sale, but only getting brokers' commission, they did not intend to act and did not act, in relation to the sellers, in a character beyond mere intermediates, and not as mere conduit pipes.' In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents; they exercised a volition in favor of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion."

It should be remarked, in regard to the judgment of Brett, J., delivered in the Exchequer Chamber, that although their lordships differed from that learned judge in the interpretation which they put upon the findings of the jury, the effect of their decisions in no way goes to detract from the value of that judgment as an exposition of the law as to brokers' liabilities.]

§ 246. Where a party contracts in writing as agent for a non-existent principal he will be personally bound, and no subsequent ratification by the principal afterwards coming into existence can change this liability, nor is evidence admissible to show that a personal liability was not intended. Thus in *Kelner v. Baxter*, (t) the plaintiff wrote to the three

Agents for
non-existing
principals.

*Kelner v.
Baxter.*

43. *Hollins v. Fowler* is cited and the subject discussed in *Pease v. Smith*, 61 N. Y. 477. See *Koch v. Branch*, 44 Mo. 542; *Hoffman v. Carow*, 22 Wend. 285. See, also, § 6, note 2. (t) L. R., 2 C. P. 174. See, also, *Scott v. Lord Ebury*, L. R., 2 C. P. 255.

defendants, addressing them "on behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited," proposing to sell certain goods for £900, which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandra Hotel Company Limited," and the goods were thereupon delivered and consumed by the company, which was not incorporated till after the date of the contract, and which ratified the purchase made on its behalf. It was held that the defendants were personally liable because there was no principal existing at the date of the contract, for whom they could by possibility be agents, and that for the same reason no ratification was possible: that the company might have bound itself by a *new* contract to buy and pay for the goods, but such new contract would require the assent of the vendor, who could not be deprived of his recourse against those who dealt with him by any action of the company to which he was no party: and that parol evidence was not admissible to affect the inferences legally resulting from the written contract. 44

§ 247. We now come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject matter of the contract, in order to be deemed a sufficient note or memorandum "of the bargain."

What written note of the terms of the contract suffices.

44. One who Contracts in the Name of a Non-existing Principal is Personally Liable.—The principle stated in the text has been often applied where a debt is incurred in the name of a company not yet organized. In *Allen v. Pegram*, 16 Iowa 163, 171, the officers of a bank, organized under a void charter, were held liable for its obligation, and *Dillon, J.*, said it was a well-settled rule "that where there is no principal who can be made legally responsible, the agent who undertakes to act for and bind such a principal will himself be personally responsible." See *Booth ada. Wonderly*, 36 N. J. L. 250, 255; *Woodbury v. Wolff*, 18 Iowa 572. *Rockford, &c., R. R. v. Sage*, 65 Ill. 328; *New York, &c., R. R. v. Ketchum*, 27 Conn. 170. But in *Whitney v. Wyman*, 101 U. S. 392, a committee of a company ordered for its use

machinery which was sent and accepted. The company's articles of association were not duly filed until afterward, and the general law forbade any corporation to do business until after such filing. But the court said that the members of the committee were not liable, the company, when duly formed, having ratified the contract, and being estopped to deny its agents' authority, and the statutory restriction being a mere inhibition, imposing no penalty and not making the act forbidden, void. See *Noe v. Gregory*, 7 Daly 283. No doubt, however, the agent would be exempt from liability if both parties acted with full knowledge of the facts, and in ignorance of the law; for example, if both, being members of a company, know of facts which should apprise them that its incorporation is void. See *ante* § 241, note 41.

[In *Mahalen v. Dublin and Chapelized Distillery Company*, (u) there was a parol agreement for the purchase of whiskey, the purchaser to have the option of paying in cash or by his acceptance at four months, and the exact quantity of the whiskey was to be ascertained by redip. Invoices were made out which represented the sale to be for "net cash," and of an ascertained quantity of whiskey. It was held, by the Court of Queen's Bench in Ireland, that the invoices did not contain the substantial and material terms of the bargain within the meaning of the statute. (v)]

§ 248. It has already been seen that the decisions establish the necessity under the fourth section of proving the whole "agreement" in writing, in order to satisfy the statute. Distinction between "agreement" and "bargain." Independently of authority, one would think that "bargain" and "agreement" are words so identical in meaning, when applied to a contract for the sale of goods, as to admit of no possible distinction; but the authorities do nevertheless distinguish them in a manner too plain to permit a doubt as to the law. ⁴⁵

In *Egerton v. Mathews*, (x) the plaintiff had been nonsuited at Guildhall, by Lord Ellenborough, on the authority of Egerton v. Mathews. *Wain v. Walters*. (y) The writing was, "We agree to give Mr. Egerton 19d. per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete." It was signed and dated.

Lord Ellenborough is reported, when granting a rule *nisi*, to have assented to a distinction between the two cases, and to have said on cause shown, "This was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires." This last expression would seem to indicate that the difficulty in his lordship's mind was, that the bargain was not complete because the plain-

(u) 11 Ir. R. C. L. 83.

(v) The 13th section of the Irish statute of frauds (7 Will. III., c 12.) is similar in its terms to the 17th section of the English act.

45. This distinction between the words "bargain" and "agreement" was recognized in *Sears v. Brink*, 3 Johns. 210, and *Leonard v. Vredenburg*, 8 Johns. 29, but was repudiated in *Packard v. Richardson*, 17 Mass. 122, which has been repeatedly

followed in Massachusetts and in Maine. See *Williams v. Robinson*, 73 Me. 186, 195, and cases there cited. See, also, notes to *Wain v. Walters* in Smith's *Leading Cases*. The effect of these latter cases is that the consideration need not be expressed in the writing, either in cases within the 4th or in those within the 17th section.

(x) 6 East 307.

(y) 5 East 10.

tiff had not signed (a point not fully settled by authority, till 1836, in *Laythorp v. Bryant*, (2) as will be seen hereafter.) (a) But Lawrence, J., said: "The case of *Wain v. Warlters* proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing, which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* made by, the party to be so charged." The learned judge, however, did not explain why the word "bargain" does not also include the terms on both sides, as was observed by Holroyd, J., when he said: "It appears to me that you cannot call that a memorandum of a bargain, which does not contain the terms of it;" and by Bayley, J., when he held in the same case (b) that the language of the two sections of the statute was in substance the same, and that the word "*bargain*" means "the terms upon which parties contract."

In *Hinde v. Whitehouse*, (c) the memorandum consisted of the auctioneer's catalogue, signed by him as agent of both parties, showing the goods sold, their marks, weight, and ^{Hinde v. Whitehouse.} price; but the court held this insufficient, because there was another paper containing the conditions of the sale, which had been read, but was not made a part of the written note of the bargain by internal evidence contained in the signed paper.

In *Laythorp v. Bryant*, (d) in 1836, which was on the 4th section, Tindal, C. J., said: "*Wain v. Warlters* was decided on ^{Laythorp v. Bryant.} the express ground that an agreement under the 4th section imports more than a bargain under the 17th." Park, J., said: "The cases on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the 4th."

In *Sarl v. Bourdillon* (e) the written note was for the sale of "candlesticks, complete." It was proven that the parol bargain was that the candlesticks should be furnished ^{Sarl v. Bourdillon.} with a gallery to carry a shade, and defendant insisted that the written note was insufficient; but after time to consider, the decision of the court was delivered by Cresswell, J., who said: "We do not feel obliged to yield to this argument. The memorandum states all that

(a) 2 Bing. N. C. 785.

(a) *Post* § 255.

(b) *Kenworthy v. Schofield*, 2 B. & C. 948.

(c) 7 East 558. See, also, *Peirce v. Corf*, 188.

L. R., 9 Q. B. 210, *ante* § 229; *Riahton v. Whatmore*, 8 Ch. D. 467.

(d) 2 Bing. N. C. 735.

(e) 26 L. J., C. P. 78; 1 C. B. (N. S.)

was to be done by the person charged, viz., the defendant, and according to the case of Egerton v. Mathews, (f) that is sufficient to satisfy the 17th section of the statute of frauds, though not to make a valid agreement in cases within the 4th section."

§ 249. In *Elmore v. Kingscote*, (g) there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from defendant to plaintiff, in the following words: "Mr. Kingscote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him: and if not most clearly proved Mr. K. will most decidedly have nothing to do with him." The court held this insufficient, saying, "The price agreed to be paid constituted a material part of the bargain."

In *Ashcroft v. Morrin*, (h) defendant ordered certain goods to be sent him, saying, "Let the quality be fresh and good, and on moderate terms." On objection made that the price was not stated, the court said: "The order is to send certain quantities of porter and other malt liquor, on moderate terms. Why is not that sufficient? That is the contract between the parties:" and set aside the nonsuit according to leave reserved.

In *Acebal v. Levy*, (i) there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. Plaintiff not being successful in establishing the validity of the contract by satisfactory proof of delivery and acceptance, then attempted to support his case by a letter which did not state the price, and by insisting that a contract of sale was valid without statement of price, because the law would imply a promise to pay a reasonable price. But the court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient to satisfy the statute.

§ 250. In *Hoadly v. M'Laine*, (k) the same court was called on to

(f) 6 East 307.

(g) 5 B. & C. 583.

(h) 4 M. & G. 450.

(i) 10 Bing. 376; and see *Jeffcott v.*

North British Oil Company, 8 Ir. R. C. L. 17.

(k) 10 Bing. 482.

decide, in the ensuing term, the very point which had been left undetermined in *Acebal v. Levy*. The defendant gave plaintiff an order in these words: "Sir Archibald McLaine orders Mr. Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments, &c. * * * the whole to be ready by the 1st of March, 1833." Nothing was said about the price. The judges were all of opinion that as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal, C. J., said: "This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park, J., said: "It is only necessary that price should be mentioned, *when price is one of the ingredients of the bargain* * * * and it is admitted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient."

Price not stated where it had not been agreed on.

Hoadly v. McLaine.

In *Goodman v. Griffiths*, (1) the plaintiff showed defendant an invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote an order: "Please to put to my account four mechanical binders," and signed it. Held, that as there had been a parol agreement as to price, which was not included in the note of the bargain, the statute was not satisfied.

Goodman v. Griffiths.

§ 251. It is plainly deducible from the foregoing decisions, that so far as price is concerned, the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the statute; and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price.⁴⁶

General rule as to price.

(1) 26 L. J., Ex. 145, and 1 H. & N. 574.

46. Statement of the Consideration. — See ante § 232, note 30, as to statement of consideration in contracts within the

fourth section. In most of the states no distinction is made between the fourth and seventeenth sections in this regard. In many of the states it is expressly provided by statute that the memorandum

As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the court to understand what they actually were, in order to satisfy the statute.⁴⁷

Other terms of the contract must be so expressed as to be intelligible.

need not state the consideration. See *Browne on Statute of Frauds*, § 391. In *James v. Muir*, 33 Mich. 223, 227, the suit was for the price which the writing did not express, and the court said that if the agreement was as claimed to pay the market price, that should have been stated in the writing. Whether the memorandum would have been sufficient if no price had been fixed, the court did not determine. In *Rollins v. Claybrook*, 22 Mo. 405, the buyer paid \$29 on account of the purchase of a lot of hogs, and a written memorandum, not stating the number of hogs bought, was made. The seller refusing to deliver the hogs, the buyer sued to recover the \$20. The court held that it was proper to show the whole contract by oral evidence. This was undoubtedly correct, for the payment had satisfied the statute and the memorandum was on its face incomplete. This case falls short of sustaining the recent decision of *O'Neil v. Crain*, 67 Mo. 250, where on the supposed authority of *Rollins v. Claybrook*, and other cases of sales not within the statute, parol testimony was said to be properly admitted to prove the price, which was not stated in the memorandum. But the case was decided on other grounds. In *The Argus Company v. City of Albany*, 55 N. Y. 495, 503, the contract was for printing for the city for three years "at the rates current in the city." *Folger, J.*, said: "Nor does the fact that the rates for printing and binding are not expressed, but reference is made to something outside of the contract, and which must be established by parol testimony, to invalidate the contract. This contract is not so much open to objection for this cause as if no price was expressed, nor reference made to anything by which

it might be determined, and the parties were left to proof of a *quantum meruit*. Yet, in such case, a memorandum has been held to be in compliance with the statute." Cites *Hoadley v. McLaine* and *Ashcroft v. Morrin*, stated in the text, §§ 249, 250. In *Ide v. Stanton*, 15 Vt. 685, 691, where written evidence was furnished of all the terms of the contract except the price, *Royce, J.*, said: "Since a stipulated price is thus seen to enter into the legal contemplation of a bargain, we could not doubt, even in the absence of more direct authority, that when the statute came to require written evidence of the bargain, it intended that the price, like other essential terms of the contract, should be proved by such evidence." A contract providing that the price shall be fixed by certain appraisers, sufficiently expresses the price. *Norton v. Gale*, 95 Ill. 533, 538. An agreement to sell for "the same sum which I paid him for the same" is sufficient. *Atwood v. Cobb*, 16 Pick. 227. See *Newbery v. Wall*, 65 N. Y. 484; *Stone v. Browning*, 68 Id. 598, 604; *Kay v. Curd*, 6 B. Mon. 100, 103; *Whipple v. Parker*, 29 Mich. 369, 373; *Carr v. Passaic, &c., Co.*, 19 N. J. Eq. 424; *Thomas v. Hammond*, 47 Tex. 42; *Soles v. Hickman*, 20 Penna. 180; *Parry v. Spikes*, 49 Wis. 384.

47. The Memorandum must Intelligibly Express all the Substantial Terms of the Bargain.—In *James v. Muir*, 33 Mich. 223, 230, *Campbell, J.*, said that the statute of frauds, "whatever may be the rule as to price, requires that the memorandum shall at least show all the other terms of the contract, and especially must show that it is a contract of sale." In *Williams v. Robinson*, 73 Me. 186, 195, *Virgin, J.*, after explaining

§ 252. It has already been shown that where these terms are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not con-

that the consideration need not be expressed, on the authority of *Packard v. Richardson*, 17 Mass. 122, continues: "Nevertheless, in order that the court may ascertain the rights of the parties from the writing itself, without resort to oral testimony to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty, as may be understood from the memorandum and other written evidence referred to (if any) without any aid from parol testimony." In *Riley v. Farnsworth*, 116 Mass. 223, the memorandum of an auction sale stated all needful terms, but added that the vendor should fulfill the conditions of sale. These conditions having been announced orally and not put in writing, it was held that no suit could be maintained on the contract. See *Coddington v. Goddard*, 16 Gray 436; *Oakman v. Rogers*, 120 Mass. 214. In *O'Donnell v. Leeman*, 43 Me. 158, the written memorandum provided that one-third of the price should be "cash down," but no provision was made for payment of the residue. The court refused to enforce the contract as completed by parol. See *Jenness v. Mount Hope Ins. Co.*, 53 Me. 20; *Horton v. McCarty*, 53 Me. 394. Although, as will be seen, (§ 254, *post*), an oral acceptance of a written offer will bind the party signing the written offer, the converse is not true; and a written acceptance of an oral offer, not containing its terms, will bind neither party. *Washington Ice Co. v. Webster*, 62 Me. 341, 358; *McElroy v. Buck*, 35 Mich. 434. That the terms of the contract must appear in writing, see further *Stone*

v. Browning, 68 N. Y. 598, 604; *Norris v. Blair*, 39 Ind. 90; *Johnson v. Buck*, 35 N. J. L. 338, 343; *Reid v. Kenworthy*, 25 Kan. 701; *Smith v. Jones*, 66 Ga. (11 Reporter 769;); *Salmon Falls v. Goddard*, 14 How. 446; *Randall v. Rhodes*, 1 Curt. C. C. 90, 92; *Mingaye v. Corbett*, 14 U. C. C. P. 557; *Ryan v. Salt*, 3 U. C. C. P. 83, 87. But it is not necessary that the writing should express terms which may fairly be implied from what is written. Thus in *Butler v. Thomson*, 92 U. S. 412, the brokers delivered a "sold note" reciting a sale but no purchase, and it was held in the United States Circuit Court that this was not sufficient. But on appeal this was reversed. Hunt, J., said: "The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought."

Distinction between Written Memorandum and Written Agreement.—It is to be remembered that where the contract is on its face complete, the parties cannot allege that any terms are omitted, if they have signed it as their contract. It is only where the written memorandum was made by an agent, with no authority to make any contract, except that which the parties have expressly authorized, or where the memorandum is some letter or collateral writing signed by the party, with some other view than to make a written contract, that these inquiries whether there are any more terms not included in the writing, can be permitted. As was said by Senator Verplanck, in *Davis v. Shields*, 26 Wend. 341, 361, referring to a broker's memorandum, "When subscribed by the parties themselves, the memorandum would become the contract itself, and so put an end to all questions about prior negotiations." See *Coddington v. God-*

tradictory. (m) In *Jackson v. Lowe*, (n) and *Allen v. Bennett*, (o) the different writings were held consistent, so as to form a sufficient memorandum, while the reverse was held as to the written evidence offered in *Cooper v. Smith*, (p) *Richards v. Porter*, (q) *Smith v. Surman*, (r) and *Archer v. Baynes*. (s)

In *Thornton v. Kempster*, (t) the broker's bought note described the article bought as "sound and merchantable Riga Rhine hemp," and the sold note as "St. Petersburg clean hemp," the former description being of an article materially different in quality and value from the latter. Held, that the *substance of the contract* was not shown by the written bargain evidenced by two papers that materially varied from each other.

In *Archer v. Baynes*, (s) the court held the correspondence between the parties an insufficient note of the bargain, because not containing all the terms of the contract. The court say of the defendant: "It is clear, from the letters, that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing."

In *Valpy v. Gibson*, (u) in which the statute of frauds was not in question, it was contended on behalf of the plaintiffs that the terms of the contract did not appear, because the mode and time of payment had not been specified. But the court said: "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." And the court held, in the case before it,

dard, 16 Gray 436; and see §§ 202, 205, ante.

(m) *Ante* § 222.

(n) 1 Bing. 9.

(o) 3 Taunt. 169.

(p) 15 East 103.

(q) 6 B. & C. 437.

(r) 9 B. & C. 561.

(s) 5 Ex. 625; 20 L. J., Ex. 54; *Haughton v. Morton*, 5 Ir. R. C. L. 329.

(t) 5 Taunt. 786.

(u) 4 C. B. 835.

that the contract between the parties was one of the nature above described, and was valid.

§ 253. It was decided in the Common Pleas in opposition to the intimation of opinion in *Blackburn on Sales*, (x) that a letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain to satisfy the 17th section.⁴⁸ In *Bailey v. Sweeting*, (y) the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to £38 10s. 6d., which goods I have never received, and have long since declined to have, for reasons made known by you at the time, &c., &c." Erle, C. J., in his opinion, said the letter "in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney glasses at the sum of £38 10s. 6d., but I decline to have them because the carrier broke them.' Now the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned Chief Justice then referred to the passage from *Blackburn on Sales*, and declared his inability to assent to it, and in this the other judges, Williams, Willes and Keating, concurred. (z)

A letter repudiating a contract may be a sufficient note of it.

Bailey v. Sweeting.

In *Wilkinson v. Evans*, (a) the defendant also refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the caudles and the cheese is returned." Held,

Wilkinson v. Evans.

(x) Page 66. In *Buxton v. Rust*, (in 11 Allen 123. But a distinction must be made between a letter admitting the contract and complaining of its performance, and a letter denying the existence of such contract as the other party claims. In the latter case the letter is not evidence of the contract. *Bacon v. Eccles*, 43 Wis. 227, 235. And see *Caulkins v. Hellman*, 47 N. Y. 449, 456.

48. This principle has been often referred to in the United States with apparent approval. *Townsend v. Hargraves*, 118 Mass. 325, 335; *Stone v. Browning*, 38 N. Y. 598, 604; *Newbery v. Wall*, 65 N. Y. 484; *Johnson v. Trinity Church*, 224.

(y) 30 L. J., C. P. 150; 9 C. B. (N. S.) 843.

(z) See *ante* § 227, remarks on *Richards v. Porter*.

(a) L. R., 1 C. P. 407; 35 L. J., C. P. 224.

that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Nonsuit set aside.

[In the *Leather Cloth Company v. Hieronimus*, (b) the defendant wrote a letter admitting the purchase, and referred to the plaintiff's letter containing the invoice, but repudiated any liability because the goods had been sent by a wrong route, and it was held that there was a sufficient note of the bargain to satisfy the 17th section.]

*Leather Cloth
Company v.
Hieronimus.*

§ 254. A note or memorandum of the bargain is sufficient, although it contain a mere proposal, if supplemented by parol proof of acceptance. This had been held, by *Kindersley, V. C.*, in *Warner v. Willington*, (c) and that case was followed by the Court of Common Pleas, in *Smith v. Neale*, (d) and by the Exchequer, in *Liverpool Borough Bank v. Eccles*, (e) The question came before the Exchequer Chamber in *Reuss v. Pickley*, (f) and after full argument, the judges, six in number, unanimously confirmed the cases just cited, and expressed their approval of the reasoning of the Vice Chancellor in *Warner v. Willington*. 49

Parol proof of
acceptance of
written proposal
sufficient to bind
signer of
proposal.

(b) L. R., 10 Q. B. 140.

(c) 3 Drew. 523, and 25 L. J., Ch. 662; and see *Clarke v. Gardiner*, 12 Ir. C. L. R. 472.

(d) 2 C. B. (N. S.) 67, and 26 L. J., C. P. 143.

(e) 4 H. & N. 139; 28 L. J., Ex. 123.

(f) L. R., 1 Ex. 342; 35 L. J., Ex. 218.

49. One who makes a Written Proposal of Sale or Purchase is bound by an Oral Acceptance.—In *Justice v. Lang*, 42 N. Y. 493, this subject was discussed with great fullness and a re-argument was ordered and heard. The suit was brought for breach of an agreement signed by the seller alone, to deliver to plaintiff one thousand rifles in New York at \$18 apiece. The defence was that the buyer had not given the seller any written promise to pay, and that there was therefore want of mutuality and of con-

sideration for the promise. After a full review of the New York cases the suit was sustained and sent back for a new trial, in which verdict was directed for plaintiff. On the second appeal *Allen, J.*, expressed some dissatisfaction with the prior decision, which he said was "that a promise void in law, made by one party, was a good consideration for a promise by the other," but held himself bound by it, and proceeded to inquire whether there was in fact "an implied verbal promise of the plaintiff to accept and pay for the rifles," that being the consideration. It appeared that when the agreement was delivered the plaintiff put it in his pocket and walked away with it, but it did not appear that he informed defendant that he accepted the agreement. The court held that it was a question of fact for the jury whether there was an acceptance, and whether the offer was de-

In the United States it has been held that if terms of credit have been agreed on, or a time for performance fixed by the bargain, the memorandum will be insufficient if these parts of the bargain be omitted. (g) ⁵⁰

Decisions in
America.

livered under circumstances calling for a written acceptance, and the court erred in directing a verdict; whereupon the case was sent back for a third trial. This question raises a greater difficulty in New York for the reason that the statute of frauds of that state expressly provides that a contract within the statute is *void*, so that the oral promise which is the consideration for that in writing, is not merely one on which no action will lie, as is the case under the terms of the English act. It appears that after the case of *Justice v. Lang* had been tried for a third time it came once more to the Court of Appeals, and an unreported opinion of Judge Allen is cited and approved in *Mason v. Decker*, 72 N. Y. 595, 598, by Earl, J., who says: "The agreement of the seller to sell need not be in the paper signed by the purchaser. If the purchaser signs an agreement to buy, and delivers it to the seller, and he agrees by parol to sell upon the terms mentioned in the paper signed by the purchaser, there is a binding agreement which can be enforced against the purchaser." See *Thompson v. Menck*, 2 Keyes 86; *Napier v. French*, 40 N. Y. Super. 122. In *Sanborn v. Flagler*, 9 Allen 474, *Bigelow, C. J.*, said: "The rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it, may always be proved by

evidence *aliunde*." But in *Lang v. McLaughlin*, 14 Minn. 72, the court held that parol evidence was not admissible to show acceptance of a written offer by letter to sell land, and this case is explained in *Wemple v. Knopf*, 15 Minn. 440, on the ground that the writing was in form an offer and not an agreement. In Maine, where the statute conforms in substance to that of England, a defendant was sued for breach of his written agreement to furnish ice, the plaintiff having signed no paper. The court instructed the jury that if the plaintiff by word of mouth agreed to pay the price, "that parol agreement to pay the price on his part would be a sufficient consideration for that contract, although it does not appear in the memorandum," and this was sustained. *Williams v. Robinson*, 73 Me. 186. See *Ives v. Hazard*, 4 R. I. 14.

(g) *Davis v. Shields*, 26 Wendell 341; *Salmon Falls Company v. Goddard*, 14 Howard (Sup. Ct. U. S.) 446; *Morton v. Dean*, 13 Metc. 388; *Soles v. Hickman*, 20 Penna. St. 180; *Buck v. Pickwell*, 1 Williams (Vt.) 167; *Elfe v. Gadsden*, 2 Rich. (S. C.) 373.

50. The Terms of Payment must be Written, Unless they are such as the Law Implies—Cash on Delivery. —Where an auction sale was made on a credit of nine months, the purchasers giving notes with good security, the memorandum of sale showed none of these terms. *Held*, that the purchaser was not bound, his purchase exceeding \$50. *Norris v. Blair*, 39 Ind. 90. And in *Davis v. Shields*, 26 Wend. 341, 350, in New York Court of Errors, Chancellor Walworth said: "The omission of the stipulated *time of credit* in the written memorandum rendered the supposed

agreement stated therein, wholly inoperative as to both parties," and the offer of the buyer to waive the objection and pay cash, was held of no avail. In *Wright v. Weeks*, 25 N. Y. 156, the time of payment was to be "as specified." Denio, C. J., said: "The question is whether a parol agreement thus referred to in a written contract is made parcel of the contract, so as to satisfy the statute of frauds. * * * I think the parol evidence would have been admissible if the case had arisen under an agreement not required by the statute to be in writing. An express reference by the terms of a written instrument to a parol contract, would not require the exclusion of such verbal contract under the rule that a written instrument merges all parol stipulations made at the same time on the same subject. But the present is a contract which the statute declares shall be void, unless some memorandum thereof be in writing, subscribed, &c. It is the obvious sense of the enactment that all the material parts of such a contract should be embraced in the writing. * * If a reference in a writing to a verbal agreement would let in that agreement, where the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing, to sign a statement that they had contracted verbally respecting a given subject, and they would thus dispense with the statute." In *Foot v. Webb*, 59 Barb. 38, 52, the written contract provided for performance when the purchaser secured the payment of the price. This was held not within the statute, as the writing contained the whole contract, but the contract itself was held invalid for uncertainty. In *Williams v. Robinson*, 73 Me. 186, the writing did not show time of payment, and it was argued that

it was defective because the oral agreement provided for payment on delivery of the property, which delivery was, by the written agreement, to be on ship-board. But the court charged that the jury might consider whether this was not equivalent to the contract which the law implied, namely, cash on delivery, and this was sustained in the appellate court. See *O'Donnell v. Leeman*, 43 Me. 158; *Warren v. Wheeler*, 8 Metc. 97.

Terms of Warranty and Conditions must be Included in the Writing.—In *Boardman v. Spooner*, 13 Allen 353, 361, the goods were sold subject to examination by one of the buyers, and this feature was not included in the broker's note. It was argued that this was a collateral agreement, and *Street v. Blay* was cited to the effect that a warranty or sale by sample was a collateral agreement, and the inference was that such an agreement might be proved by parol. But Foster, J., said that in Massachusetts a warranty is "treated as a condition subsequent at the election of the vendee," and hence is an essential term of the sale and must be included in the writing. *Peltier v. Collins*, 3 Wend. 459; *Shetton v. Gerrish*, 9 Cush. 89; *Coddington v. Goddard*, 16 Gray 436, *Frost v. Blanchard*, 97 Mass. 155. In *Remick v. Sandford*, 118 Mass. 102, the memorandum made by a broker was held insufficient because it omitted to state that the sale was by sample. In *Dodd v. Farlow*, 11 Allen 426, a broker introduced into his note of sale a warranty of quality. It was held that no action could be sustained on the note against the seller for non-delivery. It must be remembered that only the parties to a sale can object to its validity for lack of a sufficient memorandum. See *Lewis v. Wells*, 50 Ala. 198, 206; and see *ante* § 210, note 7.

CHAPTER VII.

OF THE SIGNATURE OF THE PARTY.

	SEC.		SEC.
Only signature required is that of the party to be charged.....	255	Signatures may be in print, or by stamping the name, and in any part of the writing	258
Contract good or not at election of the party who has not signed.....	255	When not subscribed, a question of fact whether it was intended as a signature.....	258
Signature not confined to actual subscription	256	Signature may be referred from what is signed in one part of a paper to what is unsigned, not reversely.....	263
Mark sufficient, or pen held by a third person.....	256	Signature affixed <i>alio intuitu</i>	264
Description of himself by the writer of the note insufficient.....	256		
Signature by initials.....	257		

§ 255. The 17th section requires the writing to be "signed by the parties to be charged," &c., and the 4th section, "by the party to be charged," &c. Under both sections it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed.

Signature of the party to be charged alone is sufficient.

Contract good or not at election of party who has not signed.

In *Allen v. Bennett*, (a) in 1810, the Court of Common Pleas considered the question as already settled under the 17th section by authority and practice. And in *Thornton v. Kempster*, (b) the same court declared that contracts may subsist which, by reason of the statute of frauds, could be enforced by one party, though not by the other.

Allen v. Bennett.

In *Laythorp v. Bryant* (c) the point was decided under the 4th section, after full argument.

Laythorp v. Bryant.

The foregoing decisions have never since been questioned, and the law on the subject is settled not only by them, but by the more recent case of *Reuss v. Picksley*, (d) in the Exchequer Chamber, and the decisions quoted *ante* § 254, in which it was held that a written proposal, signed by the party to be charged, was a sufficient note of the

(a) 3 Taunt. 169.

(c) 2 Bing. N. C. 735, and 3 Scott 238.

(b) 5 Taunt. 786.

(d) L. R., 1 Ex. 342; 35 L. J., Ex. 218.

bargain, if supplemented by parol proof of acceptance by the other party.¹

§ 256. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged.

Actual subscription not necessary.

Thus, a mark made by a party as his signature is sufficient, if so intended. And in *Baker v. Dening*, (e) where the question arose under the 5th section of the statute, which relates to wills and devises, the court held, that it was not necessary to show that the party signing by a mark was unable to write his name: and the judges expressed the opinion, that a mark would be a good signature even if the party signing was able to write his name.

Mark sufficient, or pen held by a third person.

Baker v. Dening.

In *Helshaw v. Langley*, (f) the signature of a party was decided to be sufficient, when he, being unable to write, held the top of the pen, while another person wrote his signature.

Helshaw v. Langley.

But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is insufficient. Thus, a letter by a mother to her son, beginning, "My dear Robert," and ending, "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother. (g)²

Description by the writer insufficient.

§ 257. Whether a signature by initials would suffice seems not to have been decided expressly.

In *Hubert v. Moreau*, (h) the question was raised under the act 6

1. See note 49 to § 254. See, also, 31; *Hunter v. Giddings*, 97 Mass. 41; *Dykens v. Townsend*, 24 N. Y. 57; *Steele v. Taft*, 22 Hun 453; *Clason v. Bailey*, 14 Johns. 484, 487; *Mason v. Decker*, 72 N. Y. 595, 598; *Weightman v. Caldwell*, 4 Wheat. 85; *Merin v. Marts*, 13 Minn. 191; *Wemple v. Knopf*, 15 Id. 440; *Gartwell v. Stafford*, 12 Neb. 545, 552; *Newby v. Rogers*, 40 Ind. 9; *Ivory v. Murphy*, 36 Mo. 534; *Groover v. Warfield*, 50 Ga. 644, 653; *Rutenberg v. Main*, 47 Cal. 213; *Lowber v. Connit*, 36 Wis. 176, 182; *Thayer v. Luce*, 22 Ohio St. 62, 76; *Marquese v. Caldwell*, 48 Miss. 23, 31; *Dressel v. Jordan*, 104 Id. 407; *McFarson's Appeal*, 11 Penna. 508. (e) 8 Ad. & E. 94. See, also, *Harrison v. Elving*, 3 Q. B. 117. (f) 11 L. J., Ch. 17. (g) *Selby v. Selby*, 3 Mer. 2. 2. "Making a mark is signing." *Zacharie v. Franklin*, 12 Pet. 151, 162; *Tagiasco v. Molinari*, 9 La. 512; *Madison v. Zabriskie*, 11 Id. 251; *Bickley v. Keenan*, 60 Ala. 293. (h) 2 C. & P. 528.

Geo. IV., c. 16, § 131, which made void a promise by a bankrupt to pay a debt from which he had been discharged, unless the promise was made in writing, "signed by the bankrupt." The report states, that the letter had no name attached to it, but something that looked like an M. Best, C. J., said, on looking at it: "It may be an M, or it may be a waving line; but if it be an M, I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject." His lordship refused the plaintiff permission to prove by parol that the defendant usually signed in that way. Afterwards a witness was called, who stated as his opinion that the mark which was taken to be an M was nothing but a flourish, and the plaintiff was thereupon nonsuited. The court *in banc* afterwards refused a rule to set aside the nonsuit, the rule being taken on the ground that the M was a sufficient signing, because it was the sign used by the party to denote that the instrument was his.

In the report of the same case, as given in 12 Moore C. P. 216, the language of the court, in refusing the new trial, would indicate that as a question of *fact* there was no mark appended to the writing, and placed there by the writer with the intention of making it his signature. The Chief Justice put the case as follows: "Undoubtedly the signing by a mark would satisfy the meaning of the statute, *but here there is nothing intended to denote a signature*, nor does the name of the defendant appear in any part of the letter."

In *Sweet v. Lee*,⁽ⁱ⁾ the writing was signed with the initials T. L., but in the writing were the words "Mr. Lee," in the handwriting of defendant, and nothing was decided as to the sufficiency of the signature. And the same observations apply to the *Nisi Prius* cases of *Phillimore v. Barry*, 1 Campb. 513, and *Jacob v. Kirk*, 2 Mood. & Rob. 221.

There seems to be no doubt that if the initials are intended as a signature by the party who writes them, this shall suffice, but not otherwise. ^(k) 3

(i) 3 M. & G. 452.

(k) See remarks of Lord Westbury in *Caton v. Caton*, L. R., 2 H. L. 127, 143; *Chichester v. Cobb*, 14 L. T. (N. S.) 433; *Sugden V. & P.* 144 (ed. 1862.)

3. "A person may execute an instru-

ment and bind himself as effectually by his initials as by writing his name in full." *Beardsley, J.*, in *Palmer v. Stephens*, 1 Denio 471, 478. In this case a clerk who wrote his employer's name added his own initials, and parol evidence

§ 258. The signature may be in writing or in print (and the writing may be in pencil, *Geary v. Physic*, 5 B. & C. 234; ⁴ or by stamping the name, *Bennett v. Brumfitt*, L. R., 3 C. P. 28,) and it may be in the body of the writing, or at the beginning or end of it. But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract ⁵

Signature may be in print or by stamp, and in the body of the paper, or at beginning or end.

When not subscribed, a question of fact.

§ 259. In *Saunderson v. Jackson*, (1) the plaintiff, on giving to the defendants an order for goods, received from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson and Hanson, distillers, No. 8,

was admitted to show that he did so merely to indicate by whom the employer's name was signed. In *Augur v. Couture*, 68 Me. 427, defendant was held liable on a writing signed by him "Seam," that being a translation of his name "Couture." In *Brown v. Butchers' and Drovers' Bank*, 6 Hill 443, a party placed the figures 1, 2, 8 upon the back of a note, and was held thereby as endorser on proof of that intent. A signing of a memorandum of sale by initials was sustained in *Salmon Falls Manufacturing Company v. Goddard*, 14 How. 447, and in *Sanborn v. Flagler*, 9 Allen 474. See *Smith v. Howell*, 11 N. J. Eq. 349.

4. See *ante* § 231, note 29. See, also, *Brown v. Butchers' and Drovers' Bank*, 6 Hill 443; *Hicks v. Whitmore*, 12 Wend. 548, 554.

5. In *Batturs v. Sellers*, 5 Harr. & J. 117, acceptance by the buyer of a bill of parcels made out to him in his presence by a commission merchant was held a valid signing, though his name appeared at the head of the bill only. *Hawkins v. Chace*, 19 Pick. 502. In *Penniman v. Hartshorn*, 13 Mass. 87, 91, objection was made to a memorandum of sale that the names of defendants were written above

and not below the body of the paper. But *Parker, C. J.*, said: "We think this a slight objection." See *Adams v. Field*, 21 Vt. 256; *Brink v. Spaulding*, 41 Vt. 96; *McConnell v. Brillhart*, 17 Ill. 354; *Fessenden v. Mussey*, 11 Cush. 127; *Coddington v. Goddard*, 16 Gray 436, 444; *Anderson v. Harrold*, 10 Ohio 399; *Smith v. Howell*, 11 N. J. Eq. 349. But the signature should be such as to amount to an authentication of the writing as the agreement of the party. *Browne on Stat. of Frauds*, § 357. That a printed signature will suffice, see *Commonwealth v. Ray*, 3 Gray 441, 447; *Lerned v. Wannemacher*, 9 Allen 412, 416. But a printed signature must be verified as coming from the party to be charged thereby. *Brayley v. Kelly*, 25 Minn. 160. In *New York* a printed name is not sufficient. *Vielie v. Osgood*, 8 Barb. 130. In that state the statute requires the memorandum to be subscribed, and this is held to require a signing at the end. *Davis v. Shields*, 26 Wend. 341; *James v. Patten*, 6 N. Y. 9. A signing by an agent in the presence of a party, and by his direction is equivalent to a signing by the party himself. See § 266, note 2, *post*.

(1) 2 B. & P. 138.

Oxford Street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin, 7s., £350." There was also a letter, signed by the defendants, in which they wrote to plaintiff, about a month later, "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds." Thus far the case would not amount to much as an authority on the point under discussion. His lordship went on to say: "It has been decided, (*m*) that if a man draw up an agreement in his own handwriting, beginning 'I, A B, agree,' and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument, that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of Lens, Serjt., who admitted that the printed name might have amounted to a signature, if the bill of parcels had been intended to express the contract, *qua* contract, but contended that this was not the intention.

§ 260. In *Schneider v. Norris*, (*n*) the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own handwriting, and all the judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. Lord Ellenborough said: "If this case had rested merely on the printed name, unrecognized by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular

(*m*) The case referred to by his lordship is *Knight v. Cockford*, Esp. N. P. 574, and *Durrell v. Evans*, 1 H. & C. 174, and 31 L. J., Ex. 337.
 190. See, also, *Lobb v. Stanley*, 5 Q. B. (*n*) 2 M. & S. 236.

contract, it might have afforded some doubt, whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his: and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract." Le Blanc, J., compared the case to one, where a party should stamp his name on a bill of parcels. Bayley, J., put his opinion on the ground that the defendant had signed the plaintiffs' names as purchasers, and thereby recognized his own printed name as that of the seller. And Dampier, J., on much the same idea, that is, that the defendant by writing the name of the buyer on a paper in which he himself was named as the seller, recognized his name sufficiently to make it a signature.

§ 261. In *Johnson v. Dodgson*, (o) the defendant wrote the terms of the bargain in his own book, beginning with the words: "Sold John Dodgson," and required the vendor to sign the entry. The court held this to be a signature by Dodgson, Lord Abinger saying that: "The cases have decided that though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." Parke, B., concurred, on the authority of *Saunderson v. Jackson*, and *Schneider v. Norris*, which he recognized and approved.

In *Durrell v. Evans*, in the Exchequer Chamber, (p) (*post* § 266,) the cases of *Saunderson v. Jackson*, *Schneider v. Norris*, and *Johnson v. Dodgson* were approved and followed.

[In *Tourret v. Cripps*, (q) under the 4th section, a letter containing proposed terms of a contract between the defendant and the plaintiff, written out by the defendant upon paper bearing a printed heading, "Memorandum from Richard L. Cripps,"

*Tourret v.
Cripps.*

(o) 2 M. & W. 653.

(q) 48 L. J., Ch. 567.

(p) 1 H. & C. 174; 31 L. J., Ex. 337.

and sent by him to the plaintiff, was held to be a sufficient note in writing to charge the defendant.]

§ 262. In *Hubert v. Treherne*, (r) which arose under the 4th section, it appeared that an unincorporated company, called The Equitable Gas Light Company, accepted a tender ^{Hubert v. Treherne.} from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, &c., was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, &c., of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, showed that the intention was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. Maule, J., said: "The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the statute of frauds, no one could have entertained a doubt upon that point. Since the statute, the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. * * If a party writes, 'I, A B, agree, &c.,' with no such conclusion as is found here, 'as witness our hands,' it may be that this is a sufficient signature within the statute to bind A B. * * * But it would be going a great deal further than any of the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A B that he *would* sign a particular paper."

§ 263. The most full and authoritative exposition of the law on this subject is to be found in *Caton v. Caton*, (s) decided in the House of Lords in May, 1867. The paper there ^{Caton v. Caton.} relied on was a memorandum of the terms of a marriage settlement, drawn up in the handwriting of the future husband, and taken to a solicitor's for execution, but the settlement was waived by the parties,

(r) 3 M. & G. 748.

1 L. R., 2 H. L. 127.

and the memorandum was subsequently set up as containing the agreement. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials. It was held that although to satisfy the statute of frauds it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the court, the name of the party, when found in the instrument, appeared in such a way that it referred in each instance only to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury, whose opinion on this particular point was the most comprehensive of those delivered in the case, was as follows: "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of *Stokes v. Moore*, 1 Cox 219, the language of the learned judge is that the signature must authenticate every part of the instrument; or, again, that it must give authenticity to every part of the instrument. Probably the phrases 'authentic,' and 'authenticity,' are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir William Grant, in *Ogilvie v. Foljambe*, 3 Mer. 53, is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum." His lordship then criticised the different clauses of the memorandum for the purpose of showing the insufficiency of the signature when tested by these rules, and proceeded: "Now an ingenious attempt has been made at the bar to supply that defect by fastening on the antecedent words, 'In the event of mar-

riage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My lords, if we adopted that device, we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a different signification and effect from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which, by virtue of that reference, is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature not only to the thing (writing?) originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply."

The effect of these principles seems to be substantially that the reference to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse.⁶

Signature may be referred from what is signed to what is unsigned; not the reverse.

§ 264. [Signatures of directors to articles of association which contained a clause, in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, were held in *Eley v. The Positive Assurance Company*, (t) not to be signatures to a memorandum of the contract within the statute of frauds, on the ground that they had been affixed *alio intuitu*. But in *Jones v. The Victoria Graving Dock Company* (u) the signature of the chairman of a company to the minutes was held to be a sufficient signature, although put *alio intuitu*, viz., to notify the proceedings of the board under the companies act, 1862, (25 and 26 Vict., c. 89, § 67.)

Signature affixed *alio intuitu*

Eley v. Positive Assurance Company.

Jones v. Victoria Graving Docks Company.

⁶ See *ante* § 220, note 4; *Thayer v. Luce*, 22 Ohio St. 62, 74.

(t) 1 Ex. D. 20.

(u) 2 Q. B. D. 314.

In this case, *Eley v. The Positive Assurance Company* was not cited and the two decisions appear to be irreconcilable. Both these cases were under the 4th section, and the reasoning upon which the later case proceeds, viz., that the requirements of the 4th section of the statute relate only to the *evidence* of the contract, (x) is undoubtedly sound. But the same reasoning would not be applicable in the case of a signature to a memorandum of a contract under the 17th section, which, as distinguished from the 4th, seems to affect the *intrinsic validity* of the class of contracts to which it refers. (y)]⁷

(x) Per Lush, J., in delivering the judgment of the court, at p. 323.

(y) There is no conclusive authority for this, but the distinction between the two sections was drawn in *Laythorp v. Bryant*, 2 Bing. N. C. 743; 3 Scott 233, and in *Leroux, v. Brown*, 12 C. B. 801; 22 L. J., C. P. 1, a decision which, although meeting with some disapproval, until it is overruled, settles the law that the 4th section applies only to procedure, and therefore forms a part of the *lex fori*.

7. But the well-considered case of *Townsend v. Hargraves*, 118 Mass. 325,

holds that the statute of frauds affects the remedy only, and that an oral contract within the 17th as well as within the 4th section is valid, and this decision has been favorably received in the other states. See *Bird v. Munroe*, 66 Me. 337, 344. See *ante* § 91, note 2. Many cases in this country hold a signing of the minutes of a corporation by its clerk, sufficient to satisfy the statute under the 4th section. See *ante* § 1, note 28. As to admission of parol evidence to show that the signing was *also intrinsic*, see *Palmer v. Stephens*, 1 Denio 471.

CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

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§ 265. It is not within the scope of this treatise to enter into the general subject of the law of agency, which is in no way altered by the statute. The agency may be proven by parol as at common law, and may be shown by subsequent ratification as well as by antecedent delegation of authority. (a)¹ But such ratification is only possible in

(a) *Maclean v. Dunn*, 4 Bing. 722; stated in the text. *Sugd. V. & P.* 145, *Gosbell v. Archer*, 2 Ad. & E. 500; *Accebal v. Levy*, 10 Bing. 378; *Fitzmaurice v. Bayley*, 6 E. & B. 868; afterwards reversed, 9 H. L. C. 78, but not on the point

the case of a principal in existence when the contract was made (*ante* § 246.)²

It is necessary that the agent be a third person, and not the other contracting party. (u)³

Agent must be a third person, not the other contracting party.

What evidence sufficient to

§ 266. The decisions as to the sufficiency of the evidence to prove authority for the agent's signature have not been numerous under the 17th section.⁴

limited to signing a correct memorandum. In such case it may also be shown that the memorandum signed by the agent is not correct. See § 210, note 7, *ante*. As to subsequent ratification, see note 3, *infra*.

2. See *ante* note 44, § 246.

(u) *Sharman v. Brandt*, in Ex. Ch., L. R., 6 Q. B. 720.

3. *Smith v. Arnold*, 5 Mason 414; *Bent v. Cobb*, 9 Gray 397; *Tull v. David*, 45 Mo. 444. But where the auctioneer is owner his clerk may sign. *Johnson v. Buck*, 35 N. J. L. 338, 342. In *Shaw v. Finney*, 13 Metc. 453, a broker contracted to buy fish for his principal, but did so as principal. *Held*, that his memorandum, naming himself as buyer, did not bind the seller.

4. Evidence of Agency to Sign.—See *ante* § 237, note 36, § 241, note 42. In *Hawkins v. Chace*, 19 Pick. 502, the seller offered the buyer twenty barrels of flour at \$5.50 per barrel. The buyer said he would take it, and asked for a memorandum. The seller asked a bystander to make a memorandum, and he made out a bill naming both parties, the goods and the price and gave it to the buyer, who afterwards sued upon it for non-performance of contract. The court held that the memorandum was sufficient in form, but it should be left to the jury whether the agent had authority to sign the memorandum for the seller. In *Batturs v. Sellers*, 5 Harr. & J. 117, a buyer of goods from a commission merchant stood by him while he made out a bill of parcels writing the name of both parties

at the head, and took the bill away with him. It was held that such writing of his name was equivalent to a signature by himself through his agent. In *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193, 202, *Van Fleet v. C.*, referring to the signing of a mortgage, said: "The authorities hold that if the grantor's name is written by the hand of another, in his presence, and by his direction, it is his act, and the signature, in point of principle, is as actually his as though he had performed the physical act of making it." See *Gardner v. Gardner*, 5 Cush. 483; *Croy v. Busenbark*, 72 Ind. 48. In *Weaver v. Carnall*, 35 Ark. 198, 204, an agent, authorized to sign an accommodation note for his principal requested a third person to write the name, which was done. This was held to bind the principal, on the ground that the agent could delegate his power to perform a mere mechanical act. See *Williams v. Woods*, 16 Md. 220, 250. Where the authority is in writing its interpretation and extent is a question of law for the court. *Equitable Life Soc. v. Poe*, 53 Md. 28, 34; *Ferris v. Walsh*, 5 Harr. & J. 306, 308. But where the writing is ambiguous it may be explained. Thus in *Lacy v. Dubuque Lumber Co.*, 43 Iowa 510, the writing was signed "M. H. Moore, P. D. L. Co.," and evidence was admitted to show that these letters meant President Dubuque Lumber Co., and the company was held liable. In the absence of such explanation the agent will be held individually liable, as was the case in *Pratt v. Beaupre*, 18 Minn. 187.

In *Graham v. Musson*, (x) the plaintiff's traveler, ^{prove authority.} Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Maurs. at 71s.; cash, two months. Fenning's Wharf. (Signed) Joseph Dyson." ^{Graham v. Musson.}

It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing; but the court held on the evidence that Dyson was the agent of the vendor, and that the request by the purchaser that the vendor's agent should sign a memorandum of the bargain was no proof of agency to sign the purchaser's name; that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name.

This case was decided by Tindal, C. J., Vaughan, Coltman and Erskine, JJ., in 1839, and was followed by the same court in 1841, in *Graham v. Fretwell*, (y) with the concurrence ^{Graham v. Fretwell.} of Maule, J., who had succeeded Vaughan, J., on the bench.

The whole subject was fully discussed in *Durrell v. Evans*, decided in the Exchequer by Pollock, C. B., and Bramwell and Wilde, BB., in 1861, (z) and reversed by the unanimous ^{Durrell v. Evans.} opinions of Crompton, Willes, Byles, Blackburn, Keating, and Mellor, JJ., in the Exchequer Chamber in 1862. (a)

The facts were these: The plaintiff, Durrell, had hops for sale, in the hands of his factor, Noakes, and the defendant failed in an attempt to bargain for them with Noakes. Afterwards, the plaintiff and the defendant went together to Noakes' premises, and there concluded a bargain in his presence. Noakes made a memorandum of

Subsequent Ratification.—The principal cannot affirm what he cannot authorize. *Armitage v. Wido*, 33 Mich. 124, 129. In *Newton v. Bronson*, 13 N. Y. 587, a sale of land was made by an agent for an executor, who subsequently ratified it in writing. The court said that the power to sell was a personal trust and therefore could not be delegated, that a subsequent oral ratification would be of no avail; but a letter ratifying the sale, and containing all the elements of the contract, was itself a sufficient memorandum. No ratification will avail, unless the agent assumed to act for the person

who ratifies. In *Roby v. Cassitt*, 78 Ill. 638, 642, an agent made a contract to sell land for a principal who was not the owner, but it was claimed that the real owner had ratified and adopted the sale. *Held*, that such ratification must be in writing, though had the agent assumed to act for the real owner, a subsequent oral ratification would have been valid.

(x) 5 Bing. N. C. 603.

(y) 3 M. & G. 368.

(z) 30 L. J., Ex. 154; S. C., *nom. Durrell v. Evans*, 6 H. & N. 660.

(a) 31 L. J., Ex. 337; 1 H. & C. 174.

the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away. Before taking away the memorandum, the defendant requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit,) and the plaintiff and Noakes assented to this, and the alteration was accordingly made.

The memorandum was in the following words :—

“ Messrs. Evans.

“ Bought of J. T. & W. Noakes.

“ Bags.	Pockets.	T. Durrell.	} £16 16s.
	33	Ryarsh & Addington.	

“ Oct. 20th, 1860.”

The entry on the counterfoil was as follows :—

“ Sold to Messrs. Evans.

“ Bags.	Pockets.	T. Durrell.	} £16 16s.
	33	Ryarsh & Addington.	

“ Oct. 20th, 1860.”

On the trial, before Pollock, C. B., the defendant contended that he had never signed or authorized the signature of his name as required by the 17th section to bind the bargain. The plaintiff contended that the name “ Messrs. Evans ” written on the counterfoil was so written by Noakes as the defendant's agent ; that if written by himself, it would have been a sufficient signature according to the authority of *Johnson v. Dodgson* (*ante* § 261,) and that he was as much bound by the act of his agent in placing the signature there as if done by himself.

The Court of Exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the vendor, and that the request of the defendant that the memorandum should be changed from the 19th to the 20th, was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They therefore made absolute a rule for a nonsuit, for which leave had been reserved at the trial.

The Court of Exchequer Chamber, with equal unanimity, distinguished the case from *Graham v. Musson* (*ante* § 266,) and held, that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries ; and, if

so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole contract of authority.

The grounds for distinguishing the case from *Graham v. Musson* were stated by the different judges:—

Crompton, J.: "I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice, and that all the defendant did was simply taking an invoice and asking to have it altered: and if the jury had found that, a nonsuit would have been right. But, on the contrary, I think that there was plenty of evidence to go to the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence for the jury that Noakes was the agent of both parties.

Byles, J.: "What does the defendant do? First of all, he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale-note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant."

Blackburn, J.: "The case in the court below proceeded on what was thrown out by my brother Wilde, and I agree with the decision of that court, if this document were a bill of parcels, or an invoice in the strict sense, viz., a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance, I cannot as a matter of course look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps, I should draw the inference that it was, but it is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides. * * * In *Graham v. Musson*, the name of the defendant. the buyer, did not appear

on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and unless the name of Dyson was used as equivalent to Musson, there was no signature by the defendant: but in point of fact, 'J. Dyson' was equivalent to 'for or per pro. North & Co., J. Dyson.'"

§ 267. [In *Murphy v. Boese*, (b) before the Court of Exchequer, in 1875, the plaintiff sought to recover the price of goods sold to the defendant. It appeared that the plaintiff's traveler wrote out the order for the goods in duplicate upon printed headings in the defendant's presence, handed to him the duplicate memorandum and retained the original. Held, that there was no evidence that the traveler had authority to sign the memoranda as the defendant's agent, so as to bind him within the 17th section. The court, bound of course by the decision of the Exchequer Chamber in *Durrell v. Evans*, distinguished it upon the ground that in that case there was some evidence of the factor's authority to sign on the defendant's behalf; at the same time Bramwell, B., who was a party to the judgment of the Court of Exchequer in *Durrell v. Evans*, which was afterwards reversed by the Exchequer Chamber, and Pollock, B., expressed their doubts as to the correctness of that decision. The latter learned judge said: (c) "I think *Durrell v. Evans* can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties, in drawing up a note of the contract. But here, there is an entire absence of any act of recognition by the defendant of the traveler as his agent."]

Auctioneer is agent of both parties at a public sale, for signing the note.

§ 268. It will have been observed, that in some of the cases already referred to, it is taken for granted that an auctioneer is an agent for both parties *at a public sale*, for the purpose of signing. This has long been established law. (d) Sir James Mansfield, in *Emmerson v. Heelis*, (d) thus gave

(b) L. R., 10 Ex. 128
(c) At p. 131.

(d) *Hinde v. Whitehouse*, 7 East 558;
Emmerson v. Heelis, 2 Taunt. 38; *White*

the reason for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore, he writes the name by the authority of the purchaser, and he is an agent for the purchaser."⁵

[It would seem that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute. (e)]⁶

§ 269. It follows from this reasoning that the rule does not apply in a case where the auctioneer sells the goods of his principal at private sale, for then he is the agent of the vendor alone, and in no sense that of the purchaser. And such was accordingly the decision of the Exchequer Court in *Mews v. Carr*. (f)

But of vendor alone at private sale.

Mews v. Carr.

And on the same principle it has been held, that the circumstances of the case may be used to rebut the general inference that the auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions of the sale. Thus, in *Bartlett v. Purnell*, (g) the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy of £200, to which the defendant was entitled under the will of the deceased. The conditions of the sale were, that the purchasers were to pay a certain percentage at

His agency for purchaser at public sale may be disproved.

Bartlett v. Purnell.

v. Proctor, 4 Taunt. 209; *Kenworthy v. Schofield*, 2 B. & C. 945; *Walker v. Constable*, 1 B. & P. 306; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Durrell v. Evans*, 31 L. J., Ex. 337; 1 H. & C. 174.

5. The Auctioneer is the Agent of both Parties to Sign.—In *Horton v. McCarty*, 53 Me. 394, Kent, J., said: "The auctioneer is the agent for both parties to a certain extent. He is the agent of the seller in selling, and the agent of the purchaser to perfect the bargain by signing a proper memorandum at the proper time." *Morton v. Dean*, 13 Metc. 385; *Johnson v. Buck*, 35 N. J. L.

338; *Gill v. Hewett*, 7 Bush 10; *Linn Boyd, & Co. v. Terrill*, 13 Bush 463; *Mills v. Hunt*, 20 Wend. 431; *Price v. Durin*, 56 Barb. 647; *Townsend v. Van Tassel*, 8 Daly 261; *Harvey v. Stevens*, 43 Vt. 653.

(e) See per Malins, V. C., in *Beer v. London and Paris Hotel Company*, 20 Eq. 412, 426, and per Jessel, M. R., in *Rossiter v. Miller*, 46 L. J., Ch. 228, 231.

6. *Mills v. Hunt*, 20 Wend. 431; *Schell v. Stephens*, 50 Mo. 375.

(f) 26 L. J., Ex. 39; 1 H. & C. 484.

(g) 4 Ad. & E. 792.

the sale, and the rest on delivery. The auctioneer put the defendant's name, like that of all other purchasers, on his catalogue as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions of the sale. But the court held, that the real purchase was not a purchase at auction: that the sale was made before the auction, and that the public bidding was only used for the purpose of settling the price at which the purchaser was to take the goods under the antecedent bargain; and that the auctioneer was not the agent of the purchaser. Denman, C. J., saying, "We do not overrule the former cases, but we consider them inapplicable."

§ 270. But the agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the vendor exclusively. It is only when the bidder has become the purchaser, that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the vendor. (h) 7

Auctioneer's
agency for
buyer only
begins when
the goods are
knocked down
to buyer.

In *Bird v. Boulter*, (i) the person who signed the purchaser's name was not the auctioneer, but his clerk. Held to be sufficient. [But in that case there were special circumstances from which the clerk's authority to sign was inferred;

Auctioneer's
clerk.

Bird v.
Boulter.

(h) *Warlow v. Harrison*, 28 L. J., Q. B. 18; 1 E. & E. 295.

7. The Auctioneer's Authority to Sign for the Seller begins when the Hammer falls and ends with the Sale. —In *Smith v. Arnold*, 5 Mason 414, Story, J., said: "It has been decided that the memorandum of the auctioneer to bind the purchaser must be cotemporaneous with the sale. It cannot be made afterwards." In *Gill v. Bicknell*, 2 Cush. 355, Shaw, C. J., said: "The technical ground is that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers an authority on the auctioneer or his clerk to sign his name, and this is the whole extent of

his authority." In *Horton v. McCarty*, 53 Me. 394, the auctioneer entered the sale and the buyer's name in a book, on his return from a sale, and this was held too late. In *Hicks v. Whitmore*, 12 Wend. 548, a statute requiring a memorandum to be made in a sale-book at the time of the sale was interpreted, and it was held necessary that all the terms should be written at the time and place of sale. *Hicks v. Whitmore* is cited and followed in *Craig v. Godfrey*, 1 Cal. 415, where an entry of the buyer's name in the evening or on the next day was held insufficient. See *Bamber v. Savage*, 52 Wis. 110.

Either Party may Retract before the Hammer falls.—See *ante* § 42 note 8.

(i) 4 B. & Ad. 443.

under ordinary circumstances the auctioneer's clerk is not the purchaser's agent.] (k) 8

Peirce v. Corf.

The signature of a clerk of a telegraph company to a despatch was held to be sufficient where the original instructions had been signed by the party, in *Godwin v. Francis*, L. R., 5 C. P. 295. 9

*Clerk of Telegraph Co.
Godwin v.
Francis.*

§ 271. The signature required by the statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *qua* agent, but only in the capacity of witness to the writing, it will not suffice. 10

*Signature by
an agent as a
witness.*

In *Gosbell v. Archer*, (l) the clerk of the auctioneer, who had

(k) *Peirce v. Corf*, L. R., 9 Q. B. 210, per Blackburn, J., at p. 215. See, also, *M'Mullen v. Helberg*, 4 L. R., Ir. 94, per O'Brien, J., at p. 105.

8. Auctioneer's Clerk.—In *Frost v. Hill*, 3 Wend. 386, the owner acted as auctioneer of his goods, and his clerk made the memorandum of sale. This was held sufficient. But in *Ijams v. Hoffman*, 1 Md. 423, 435, the court held that a memorandum made by one stated to be clerk for the seller, was not sufficient, there being no evidence that he was clerk for the auctioneer. In *Johnson v. Buck*, 35 N. J. L. 338, 342, where the auctioneer sued on his contract of sale, it was held that by thus suing he must be regarded as a party, and his signing for the buyer would not bind him. "But," continues Depue, J., "the reason of this disqualification to be the agent of the purchaser, for the purpose of signing, does not apply to the clerk of the auctioneer. * * * Where the auctioneer's clerk, or a volunteer, acts openly at a sale in entering the successful bids, as they are publicly announced, his authority to act for the purchaser in the premises is established." Cites *Gill v. Bicknell*, 2 Cush. 355. To the same effect see the similar case of *Coate v. Terry*, 24 U. C. C. P. 571. In *Bamber v. Savage*, 52 Wis. 110, the auctioneer made no memorandum, but one was made by

an agent of the seller, without the knowledge of the buyer. It was held void. See *Norris v. Blair*, 39 Ind. 90; *Alna v. Plummer*, 4 Me. 258; *Smith v. Jones*, 7 Leigh 165; *Clarkson v. Noble*, 2 U. C. Q. B. 361; *Flintoft v. Elmore*, 18 U. C. C. P. 274.

9. Sufficiency of Memorandum by Telegrams.—This subject was considered in *Smith v. Easton*, 54 Md. 138, 144. The original message had been destroyed, but the court refused to accept the delivered writing as a copy without proof of the original, and held that the original was not sufficiently proved by showing that it was a reply to a message sent the same day. See *United States v. Babcock*, 3 Dill. 576; *Howley v. Whipple*, 48 N. H. 487. Instances of sales made by telegraph will be found in *Murphy v. Thompson*, 28 U. C. C. P. 233, and *Balantyne v. Watson*, 30 U. C. C. P. 529. It was held in *Kingborne v. Mutual Tel. Co.*, 18 Q. B. 60, that the original messages signed by the parties were necessary to prove a contract, but this seems to be now changed by statute of Ontario, 36 Vict., c. 11.

10. In *Noakes v. Morey*, 30 Ind. 103, a memorandum made by an agent of both parties for his own convenience, and not in their presence, was held insufficient.

(l) 2 Ad. & E. 500.

Auctioneer's
clerk as wit-
ness.

Goebell v.
Archer.

authority to act for his master, signed a memorandum of the sale, as witness to the signature of the buyer, and an attempt was made to set up the clerk's signature as that of a duly authorized agent of the vendor. The attempt was unsuccessful, and a *dictum* of Lord Eldon (m) to the contrary was said by Denman, C. J., to be open to much observation. The *dictum* of Lord Eldon was, that "where a party or principal or person to be bound signs as, *what he cannot be*, a witness, he cannot be understood to sign otherwise than as principal."

[As to the personal liability of the auctioneer for the delivery of goods sold by him, see *Woolfe v. Horne*, 2 Q. B. D. 355.]¹¹

§ 272. There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers. These persons, as a general rule, are agents for both parties, (n) and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute.¹²

(m) In *Coles v. Trecothick*, 9 Ves. 251; and see the observations of Lord St. Leonards, Sugd. V. & P., p. 143, (ed. 1862.)

11. See *Mills v. Hunt*, 20 Wend. 431.

(n) *Thompson v. Gardiner*, 1 C. P. D. 777.

12. A Broker may Sign for both Buyer and Seller.—In *Newberry v. Wall*, 65 N. Y. 484, a broker's "sold note" was produced, but it did not appear that it had been received by the buyer, though there was some proof that a copy of it had been sent to him. The argument of counsel appears to have been solely on the question whether a letter written by the buyer was a sufficient memorandum, and the court held it insufficient, and seems to have assumed that the broker's note was not obligatory on the buyer. But the same case came up again and is reported in 84 N. Y. 576. In their decision the court say that there is evidence for the jury that the copy of the note sent to the buyer was received by him, and, if so, the broker's signing was sufficient. There seems to be no

sound reason why the liability of a party on a broker's sale, should turn on the question of his receipt of the broker's note. If that is the requirement, then in every suit on a broker's sale, receipt of the note by the party sued, must be proved before recovery can be had. There is no authority for such requirement, and the language of the court looking in that direction, in *Newberry v. Wall* as last decided, is probably to be regarded as no more than an effort to conform to the former decision of the same case—not to establish a general principle for guidance in future cases. It is the rule in that court that its decisions in any case must stand as the law of that case, though overruled in other suits. *Justice v. Lang*, 52 N. Y. 325. That the broker should make a correct memorandum is essential; that he should sign it in the presence of the party to be charged, or that the signature should be shown to such party, is a requirement not to be found in the statute or decisions. Where an *unauthorised* agent signs, a ratification is necessary; but the signature of a broker who

The authority of a broker to bind his principals may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the ^{their general authority.} most part so well settled, as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law-merchant, or the custom of merchants. There are still, however, some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties. (o)

§ 273. Before entering into an examination of the authorities, it will be convenient to give a short summary of the statutes ^{Brokers in city of London.} in relation to brokers in the city of London, as many of the cases turn upon their dealings.

Until the year 1870, the brokers of London had from very early times been under the control of the corporation of the city. The statutes of 6 Anne, c. 16, 10 Anne, c. 19, § 121, and 57 Geo. III, c. 60, (p) contain provisions for the regulation of brokers, and for defining the power of the corporation. Under these acts the city formerly required a bond and an oath, the form of which, prior to the year 1818, may be found given in *Kemble v. Atkins*, 7 Taunt. 260; S. C., Holt N. P. 431. The regulations imposed, and form of the bond as altered in 1818, are printed at length in the appendix to "Russell on Factors and Brokers." It is imposed as a duty on the broker that he shall "keep a book or register, intituled 'The Broker's Book,' and therein truly and fairly enter all such contracts, bargains, and agreements, on the day of the making thereof, together with the Christian and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price

effects a sale is that of an authorized agent, and is made sufficient by the express terms of the statute. Therefore a mere memorandum signed by the broker in his sales-book is sufficient, though no signed note of sale is sent to either party. See § 294, *post*. The following are cases of authority on the validity of a broker's memorandum, and in none of them is it regarded as essential that the party sued should have been served with a copy or a duplicate of the broker's note. See, also,

the cases stated in the text. *Butler v. Thomson*, 92 U. S. 412; *Remick v. Sandford*, 118 Mass. 102; *Coddington v. Goddard*, 16 Gray 486; *Bacon v. Eccles*, 43 Wis. 227, 241.

(o) See, for example, *Dickinson v. Lilwall*, 4 Camp. 279; *Baines v. Ewing*, L. R., 1 Ex. 320; 35 L. J., Ex. 194.

(p) These statutes will be found at p. 450, of vol. I, *Chitty's Collection of Statutes*, (ed. 1880.)

of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request respectively containing therein a true copy of such entry; and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements."

But by the London brokers' relief act, 1870, (g) most of these powers were taken away, the bonds are no longer required, the rules and regulations are no longer to be enforced by the corporation, and now brokers are only required to be admitted by the corporation, and a list of brokers is kept, from which any broker may be removed for fraud or other offences in the manner specified in the act.

Brokers'
relief act,
1870.

§ 274. Lord Blackburn (r) warns his readers not to confound the contract notes here mentioned, which are a copy of the entry, with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as, or before it is entered in the book, and he remarks that no mention is made of the bought and sold notes in the bonds or regulations. But Lord Ellenborough expressly says, in *Hinde v. Whitehouse*, (s) and *Heyman v. Neale*, (t) that the bought and sold notes are "transcribed from the book," are "copies of the entry," and this may be found repeated *passim* in the reported cases, although no doubt these notes are very frequently made in the manner stated by Lord Blackburn, as is also apparent in the reported cases.

The brokers in London are bound by the customs of trade just as all other brokers are, and such customs are valid in spite of anything to the contrary in the bonds and regulations which are purely municipal. (u)

Brokers in
London bound
by customs of
trade.

§ 275. When a broker has succeeded in making a contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to

Bought and
sold notes.

(g) 33 and 34 Vict., c. 60. The reasons for passing this act are given in the note at p. 452 of Chitty's Statutes, vol. I. (ed. 1880.)

(r) Blackburn on Sale, p. 98.

(s) 7 East 559.

(t) 2 Camp. 337.

(u) Ex parte Dyster, 2 Rose 348.

the seller is called the sold note: to the buyer the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice.

The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then, in substance, says, "sold for A B to C D," and sets out the terms of the bargain: the bought note begins, "Bought for C D of A B," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, "Bought for C D," and "Sold for A B."

The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, "Bought for you by me," he gives it in this form, "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof, that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible (*ante* §§ 237-240.)

The *fourth* form is where the broker professes to sign as a broker, but is really a principal, as in the cases of *Sharman v. Brandt*, and *Mollett v. Robinson*, *ante* §§ 240, 241, in which case his signature does not bind the other party, and he cannot sue on the contract.

§ 276. According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, "I have bought for you," or "I have sold for you," plainly admits that the broker acted by his authority, and as his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note; (u) but according to the third form, the broker says, in effect, "I myself sell to you" and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note: and by the fourth form,

(u) *Thompson v. Gardiner*, 1 C. P. D. 777.

the language of the written contract is at variance with the real truth of the matter.

These observations (many of which are extracted from "Blackburn on Sale") have a direct bearing on points long in dispute, and some of which are yet vexed questions, as will abundantly appear on a review of the authorities.

§ 277. Where the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of the courts, but sometimes great change in the opinions of the same judge. As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract between the parties; and it has also been held that it was not even admissible in evidence, or, at all events, not without proof, that the entry was either seen by the parties when they contracted, or was assented to by them. The most convenient method of reviewing the decisions will be to follow the leading cases in order of time, and then deduce the propositions fairly embraced in them.

Entry in
broker's book
—conflict of
opinion as to
its effect.

§ 278. In 1806 there was this *dictum* of Lord Ellenborough in *Hinde v. Whitehouse* (x) on the subject: "In all sales made by brokers acting between the parties buying and selling, *the memorandum in the broker's book and the bought and sold notes transcribed therefrom*, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute." His lordship here speaks of bought and sold notes as mere copies of the book, and the inference would be that he considered the book, as the original, to be of more weight than copies from it.

Review of the
cases.

Hinde v.
Whitehouse.

In 1807, he gave this opinion expressly in *Heyman v. Neale* (y) saying: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. *The bought and sold note is not sent on approbation, nor does it constitute the contract.* The entry made and signed by the broker who is the agent of both parties *is alone the binding contract.* What is

Heyman v.
Neale.

called the bought and sold note *is only a copy of the other*, which would be valid and binding, although no bought or sold note was ever sent to the vendor and purchaser." In this case the bought and sold notes were sworn by the broker to be copies of the entry in his book, and the buyer had, soon after receiving the bought note, objected and said he would not be bound by it.

§ 279. In 1810, in *Hodgson v. Davies*, (z) the sale was through a broker, who rendered bought and sold notes, showing that payment was to be by bills at two and four months. Five days afterwards the defendant, being called on for delivery of the goods sold, objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, *unless his authority was limited by writing of which the purchaser had notice*. But the gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed this to be a valid and reasonable usage, but left it to the jury whether the delay of five days in objecting was not unreasonable according to the usual commercial practice, and the jury found that it was.

§ 280. In 1814, the Court of Common Pleas decided the case of *Thornton v. Kempster* (a) (*ante* § 252), where the broker's sold note described a sale of St. Petersburg hemp, and the bought note described the goods as Riga Rhine hemp, a different and superior article. The court considered the case as though no broker had intervened, and the parties had personally exchanged the notes, holding that there never had been any agreement as to the subject matter of the contract, and therefore no contract at all between the parties.

In 1816, *Cumming v. Roebuck* (b) was tried before Gibbs, C. J., at Nisi Prius, and it appeared that the bought and sold notes differed. The learned Chief Justice said: "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted."

(z) 2 Camp. 530.

(b) Holt 172.

(a) 5 Taunt. 786.

It has been surmised that the case alluded to was that of *Heyman v. Neale*, (c) but no case has been found in the reports justifying the assertion of the Chief Justice that *Heyman v. Neale* had been contradicted.

§ 281. In 1826, the subject first came before the full court in the Queen's Bench in two cases.

In the first, *Grant v. Fletcher*, (d) there was a material variance between the bought and sold notes, and the broker had made an unsigned entry in his "memorandum-book," which entry was incomplete, not naming the vendor. The plaintiff was nonsuited at the Assizes on the ground that there was no valid contract between the parties. Abbott, C. J., delivered the opinion of the court on the motion for a new trial. "The broker is the agent of both parties, and, as such, may bind them by signing the *same contract* on behalf of buyer and seller; but if he does not sign the *same contract* for both parties, neither will be bound. * * * The entry in the broker's book is, *properly speaking, the original, and ought to be signed by him*. The bought and sold notes delivered to the parties *ought to be copies of it*. A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed; but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

In *Groom v. Affalo*, (e) the other case, the decision was express that the bought and sold notes suffice to satisfy the statute, if otherwise unobjectionable, even though the entry in the broker's book be unsigned. The broker in this case made his entry complete in its terms on the 23d of February as soon as he had concluded the contract, but did not sign it. On the same evening he sent to the parties bought and sold notes signed by him, copied from the entry in his books. Next morning the defendant objected to, and returned the sold note, and refused to deliver the goods. The court held the contract binding, notwithstanding the absence of signature to the entry in the book, Abbott, C. J., saying, "The entry in the book has been called the original, and the notes copies: but there is not *any actual decision that a valid contract may not be made, by notes duly signed, if the entry be unsigned*. * * * We have no doubt that a broker ought to sign his book, and that every punctual broker will

(c) 2 Camp. 337.

(e) 6 B. & C. 117.

(d) 5 B. & C. 436.

do so. But if we were to hold such a signature essential to the validity of a contract, we should go further than the courts have hitherto gone, and might possibly lay down a rule that would be followed by serious inconvenience, because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed, and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure."

§ 282. In *Thornton v. Meux*, (f) in 1827, tried before Chief Justice Abbott, at Guildhall, there was a variance between the bought and sold notes, and plaintiff offered in evidence the entry in the broker's book to show which of the two was correct, but on objection, the evidence was excluded, the Chief Justice saying: "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the rest of the court, that the copies delivered to the parties were the evidence of the contract they enter into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion, and refuse the evidence."

§ 283. It will be apparent from the foregoing cases how completely the opinion of the learned Chief Justice had been changed; his view being, *first*, in *Grant v. Fletcher*, that the book was the original, though *probably*, if the bought and sold notes were perfect, the book might be dispensed with; *secondly*, in *Groom v. Alfalo*, that the broker's signature in his book was *not essential* to the validity of the contract; and *thirdly*, in *Thornton v. Meux*, that the signed entry was not even admissible in evidence, and that the bought and sold notes were the *sole* evidence of the contract between the parties.

§ 284. *Hawes v. Forster* (g) was twice tried; first in 1832, and again in 1834. On the first trial, the plaintiff put in the bought note, and proved by the broker that he had made the contract, entered it in his book, signed the entry, and sent the bought and sold notes to the parties on the same evening; but the broker could not tell which was first written, the entry or the notes. Plaintiff closed his evidence without calling for the sold note, and thereupon the defendant moved for non-suit, but Lord Denman held that the plaintiff was not bound to give any evidence of the sold

(f) Moo. & M. 43.

(g) 1 Moo. & Rob. 368.

note. The defendant then offered to prove by the broker's book a variance from the bought note put in, contending that the entry was the original contract; but this was objected to on the authority of *Thornton v. Meux* (*supra*, § 282,) and the evidence was rejected, Lord Denman saying: "I am of opinion that the plaintiffs have proved a contract by producing the bought note. * * * It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs; had that been the case, it would have been very material. But in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, *and to that alone*, as the evidence of the terms of the contract."

The defendants afterwards moved for a nonsuit before the court *in banc*, on the ground of the non-production of the sold note, but failed. They also moved for a new trial, on the ground of the exclusion of the broker's book, and succeeded, the Lord Chief Justice saying, "that the court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz, how the broker's book was treated by those who dealt with him." On the second trial, the sold note was produced, and corresponded with the bought note, and proof was given by merchants that the broker's book was never referred to, and that they always looked to the bought and sold notes as the contract. The broker's book showed a material variance from the bought and sold notes, and Lord Denman put the question to the jury, "Whether the bought and sold notes constituted the contract, or whether the entry in the broker's book, which in this instance differed from the bought and sold notes, constituted it?" His lordship intimated his own opinion to be that in law the note delivered by the broker was the real contract; (*h*) but said that it had been thought better to take the opinion of the jury as to the usage of trade as a matter of fact, and told them: "If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract, then you will find a verdict for the plaintiffs." The jury found for the plaintiffs, and the defendants at first indicated the intention of carrying the case to a higher court, but afterwards submitted to the verdict.

§ 285. In 1842, the Exchequer Court had the subject, together with the decision in *Hawes v. Forster*, under consideration, in the case of

(*h*) See *dictum* of Denman, C. J., also, in *Trueman v. Loder*, 11 Ad. & E. 589.

Thornton v. Charles. (i) Parke, B., and Lord Abinger held opposite opinions. Parke, B., said: "I apprehend ^{Thornton v. Charles.} it has never been decided that the note entered by the broker in his book, and signed by him, would not be good evidence of the contract so as to satisfy the statute of frauds, there being no other. The case of Hawes v. Forster underwent much discussion in the Court of King's Bench when I was a member of that court, and there was some difference of opinion among the judges; but ultimately it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. * * * *Certainly it was the impression of part of the court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract.* The jury found that the bought and sold notes were evidence of the contract; but, on the ground that these documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract, made between the parties on the footing of those notes. (k) That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (and?) and there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the statute of frauds." Lord Abinger said: "I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other, there is no contract, unless it be shown that the broker's book was known to the parties."

§ 286. In Pitts v. Beckett, (l) in 1845, the plaintiff, who had wool for sale in the hands of a wool-broker, took the defendant to the broker's office, and there sold the wool by ^{Pitts v. Beckett.} sample in the broker's presence, it being part of the bargain that the wool was to be *in good dry condition*. In the afternoon of the same day the broker wrote to the plaintiff: "Dear Sir,—We have this day sold on your account, Messrs. Beckett and Brothers" (here followed a description of the terms) "brokerage, 1 per cent. Hughes and Ronald." A machine copy of this communication was made in the broker's book. The broker did not write at all to the purchasers, nor send them any note of the contract. The note to the plaintiff said nothing about the stipulation that the bulk should be in good dry

(i) 9 M. & W. 802.

same effect, *infra*, § 289.

(k) See statement of Patteson, J., to (l) 13 M. & W. 743.

condition. The defendants rejected the wool when sent to them, on the ground that it was not in good condition, and the jury found this to be true. The evidence offered was the note written to the plaintiff, and the machine copy of it as being the entry in the broker's book. Held, that the authority given to the broker by the defendant was not to make a bargain for him, but to reduce to writing and sign the bargain actually made; that the broker, therefore, was without authority from the defendant to sign a bargain which omitted one of the material stipulations, viz., that the wool should be in good dry condition; and that the paper offered in evidence against defendants was therefore not signed by them or their agent. The judges also intimated very strongly the opinion, that the broker's signature was not intended by him to represent the buyer's signature, and that the paper was a mere letter of advice, written in his character of agent of the plaintiff, copied by machine into his letter-book, and not intended as one of the bought and sold notes usually delivered by brokers.

§ 287. In 1851, the subject was elaborately considered in the Queen's Bench, in the case of *Sievwright v. Archibald*. Sievwright v. Archibald. *Archibald*, (m) before Lord Campbell, C. J., and Erle, Patteson, and Wightman, JJ. The case was tried at Guildhall before the Chief Justice, and there was a verdict for the plaintiff, with leave reserved to move to set it aside, and enter a verdict for the defendant. The declaration set out an alleged "sold note," and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought and sold notes, and an amendment alleging the bought note was allowed, on its being stated to the learned Chief Justice that the plaintiff could give evidence of a subsequent ratification of the bought note by the defendant. The sold note was for a sale to the defendant of "500 tons *Messrs. Dunlop, Wilson & Co.'s* pig iron." The bought note was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop, Wilson & Co.'s iron: that their iron was Scotch iron, and that they were manufacturers of iron in Scotland; and that the agreement with the defendant was, that he purchased from the broker 500 tons of *Dunlop, Wilson & Co.'s* iron. The name of the sellers was given to the purchaser. The bought and sold notes were complete in every respect, and corresponded, save in the variance between the words "Scotch

(m) 20 L. J., Q. B. 529; 17 Q. B. 115.

iron" and "Dunlop, Wilson & Co.'s iron." *There was no entry in the broker's books signed by him.*

§ 288. The views of the judges differed so widely, and their observations on every branch of this vexed subject are so important, that it is necessary to transcribe them at considerable length. Lord Campbell's judgment was concurred in entirely by Wightman, J., who heard the argument in April, but was unable to be present at the decision in the following June.

His lordship first held, that there was not sufficient evidence to justify the verdict of the jury that the defendant had ratified the contract expressed in the bought note. Next, ^{Lord Campbell's opinion.} that there was no parol agreement shown by the evidence, antecedent to the bought note, and of which that bought note could properly be said to be a memorandum, but that *the agreement itself was intended to be in writing, and was understood by the parties to have been reduced to writing when made*: and his lordship then continued his reasoning on the supposition that this view was erroneous, and that there had been an antecedent parol agreement, in these words: "Can this (the bought note) be said to be a true memorandum of the agreement? We are here again met by the question of the *variance*, which is as strong between the parol agreement and the bought note, as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected to, and the declaration was amended. I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold without hesitation, notwithstanding some *dicta* and a supposed ruling by Lord Tenterden, in *Thornton v. Meux*, to the contrary, *that this entry is the binding contract between the parties*, and that a mistake made by him when sending a copy of it in the shape of a bought or sold note would not affect its validity. Being authorized by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both according to the statute of frauds, as if both had signed it with their own hands. The duty

of the broker requires him to do so, and until recent times, this duty was scrupulously performed by every broker. What are called the bought and sold notes are sent by him to his principals by way of information that he has acted upon their instructions, *but not as the actual contract which was to be binding on them*. This clearly appears from the practice still followed, of sending the bought note to the buyer and the sold note to the seller, whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; *if there be any material variance between them, they are both nullities, and there is no binding contract*. This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases, that I could not venture to contravene it if I did not assent to it. * * * In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient mention of it in writing, nor any part acceptance or part payment, the statute of frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict."

§ 289. Patteson, J., said that the sole question was whether there was a note or memorandum in writing of the bargain signed by the defendant or his agent, it being quite immaterial whether there was one signed by the plaintiff; that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made, embodying the contract, and signed by one party or his agent, he being the party to be charged, the statute was satisfied. Still, if the original contract was in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. The learned judge considered that in the case before the court the contract was not in writing; that it was made by the broker, acting for both parties, but was not signed by him or them, and that the statute therefore could not be satisfied unless there was

Patteson, J.,
opinion.

some *subsequent* memorandum, signed by the defendant or his agent. His lordship then continued: "There are subsequent memoranda signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant: the sold note to the seller, the plaintiff. Each of them in the language used purports to be a representation by the broker to the person to whom it is delivered of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract, signed by the buyer's agent, in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note. Can, then, the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his books and sign all contracts made by him; and if the broker had made such signed entry, *I cannot doubt, notwithstanding the cases and dicta apparently to the contrary, that such memorandum would be the binding contract on both parties.*" The learned judge then went on to say that he had been one of the judges of the court that granted the new trial in *Hawes v. Forster*, and he confirmed the account given of that case by Parke, B., in *Thornton v. Charles* (*supra*, § 285.) He then continued: "However, in the present case there was no signed memorandum in the broker's book. Therefore, the bought and sold notes together, or one of them, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. The court cannot possibly say, nor can a jury say, which of them is to prevail over the other. Read together, they are inconsistent; assuming the variance between them to be material, and if one prevails over the other, that one will be the memorandum, and not the two together. If, on the other hand, one only of these notes is to be considered as the memorandum in writing signed by the defendant's agent, and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them

by itself can be so treated. * * * If this were *res integra*, I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the statute of frauds, but I consider the point to be too well settled to admit of discussion. Yet there is no case in which they have varied, in which the court has upheld the contract, plainly showing that the two together have been considered to be the memorandum binding both parties, the reason of which is, I confess, to my mind, quite unsatisfactory, but I yield to authority.

§ 290. Erle, J., stated the question raised in the case as follows:

Erle, J.,
opinion.

"The defendant contends, *first*, that in cases where a contract is made by a broker, and bought and sold notes have been delivered, they alone constitute the contract, that all other evidence of the contract is excluded, and that if they vary a contract is disproved." The learned judge held, that the defendant had failed to establish this proposition, and then observed: "The question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes, which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and *that the point is whether such evidence is inadmissible, because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing. I think they are not.* If bought and sold notes, which agree, are delivered and accepted without objection, such acceptance, without objection, is evidence for the jury of mutual assent to the terms of the notes, but the assent is to be inferred by the jury, from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof, if they constituted a contract in writing. * * * The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done in his behalf. * * * No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. * * * It seems to me, therefore, that upon principle, *the mere delivery of bought*

and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree."

The learned judge then pointed out the distinction between proof of a contract, and proof of a compliance with the statute, saying: "The question of a compliance with the statute does not arise till the contract is in proof. In case of a written contract, the statute has no application. In case of other contracts, the compliance may be proved by part payment or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing; in that it may be made at any time after the contract, if before the action commenced, and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement."

His lordship then held, that upon a review of the evidence in the case, there was sufficient parol proof to show that the bought note was a correct statement of the terms of the bargain, and that defendant had acquiesced in and was satisfied with it.

§ 291. The next case was *Parton v. Crofts*, (n) in 1864, where the contract note delivered to the purchaser was alone produced in evidence, and it was held that it sufficed to prove ^{Parton v. Crofts.} the contract between the two parties, and that the presumption was that the bought and sold notes did not vary; if they did, it was for the defendant to prove the variance by giving in evidence the note sent to the seller.

In *Heyworth v. Knight*, (o) the same court decided in the same year that where the contract appears in a correspondence ^{Heyworth v. Knight.} to have been completed between the brokers, and the bought and sold notes show a variance from that contract, the parties are bound by the agreement contained in the correspondence; that the bought and sold notes are to be disregarded; and that the purchaser was bound by the agreement made in the correspondence in accordance with the authority given to his broker, although the broker had signed without authority a different contract in the bought and sold notes. In this case the decision of the Privy Council in *Cowie v.*

(n) 16 C. B. (N. S.) 11; 33 L. J., C. P. 189. (o) 17 C. B. (N. S.) 298; 33 L. J., C. P. 298.

Cowie v.
Remfry.

Remfry, 5 Moore P. C. C. 232, was very strongly disapproved by Willis, J.

No variance
that principals
are named
in one note
and not in the
other.

§ 292. The next case, in 1868, was *Cropper v. Cook*. (q) It decides that it is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold note states, "Sold to our principals, &c.," without naming the buyers. It was proven in the case that a special usage exists in the wool trade, in Liverpool, that the buyer's broker may contract in the name of the principal, or at his discretion, without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the vendor; and that the broker may do this, without communicating the fact to the buyer. The court held this usage reasonable and valid.

Thompson v.
Gardiner

§ 293. [The last case was *Thompson v. Gardiner*, (r) in 1876. A broker who acted only for the plaintiff, the seller, entered into a contract for the sale of butter to the defendant, sending a contract note to each party, but only *signing* the note sent to the plaintiff. *He, however, duly entered and signed both notes in his broker's book.* The defendant kept the bought note, but when called upon to accept the butter declined to do so on the ground that the bought note was unsigned. The court held—first (Grove, J., *dubitante*,) that the defendant by his conduct in retaining the note had acknowledged the broker's authority to *sign the contract* on his behalf; and, secondly, that even if the defendant were not bound by the broker's signature to the sold note, the signature in the broker's book was sufficient to satisfy the statute. "The broker being a broker *authorized to make a memorandum of the contract on the defendant's behalf*, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the statute of frauds to bind the defendant." *Per Our.* at p. 780.]

General prop-
ositions
deduced from
the authorities.

The following propositions are submitted as fairly deducible from the authorities just reviewed, and others quoted in the notes, though some of these points cannot be considered as finally settled.

Broker's
signed entry
constitutes the
contract.

§ 294. *First*.—The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. This proposition rests on the authority of Lord Ellenborough, in *Heyman v. Neale*, (s) of Parke, B., in *Thorn-*

(q) L. R., 3 C. P. 194.

(s) 2 Camp. 337.

(r) 1 C. P. D. 777.

ton v. Charles, (t) and of Lord Campbell, C. J., and Wightman and Patteson, JJ., in *Sievwright v. Archibald*, (u) [and of the court in *Thompson v. Gardiner*. (x)] 13

Gibbs, C. J., in *Cumming v. Roebuck*; (y) Abbott, C. J., in *Thornton v. Meux*; (z) Denman, C. J., in *Townend v. Drakeford*; (a) and Lord Abinger, in *Thornton v. Charles*, (t) are authorities to the contrary, but they seem to have been overruled in *Sievwright v. Archibald*. (u)

§ 295. *Secondly*.—The bought and sold notes do not constitute the contract. This is the opinion of Parke, B., in *Thornton v. Charles*; (b) of Lord Ellenborough, in *Heyman v. Neale*, (c) and was the unanimous opinion of the four judges in *Sievwright v. Archibald*. (u) The decision to the contrary, in the *Nisi Prius* case of *Thornton v. Meux*, (z) and the *dicta* in *Groom v. Affalo*, (d) and *Trueman v. Lodor*, (e) are pointedly disapproved in the case of *Sievwright v. Archibald*. (u)

The bought and sold notes do not.

§ 296. *Thirdly*.—But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. This was first settled by *Groom v. Affalo*, (f) and reluctantly admitted to be no longer questionable in *Sievwright v. Archibald*. (g) 14

But they suffice to satisfy the statute when they correspond.

§ 297. *Fourthly*.—Either the bought or sold note alone will satisfy

(t) 9 M. & W. 802.

(u) 20 L. J., Q. B. 529; 17 Q. B. 115.

(x) 1 C. P. D. 777.

13. In *Coddington v. Goddard*, 13 Gray 436, 442, Bigelow, C. J., referring to a memorandum in the broker's book, said: "It is not denied that this memorandum may well be made in the book of a broker. Indeed, such entry may be resorted to as the original evidence of the contract, even when bought and sold notes of the bargain, differing from each other, have been delivered to the parties." Cites *Sievwright v. Archibald*. See *Clason v. Bailey*, 14 Johns. 484; *Salé v. Darragh*, 2 Hilt. 184, 197; *Williams v. Woods*, 16 Md. 220, 250. But as we have seen, the entry in the broker's book may be shown

to vary from the bargain actually concluded, (*Davis v. Shields*, 26 Wend. 341, ante § 209,) and it may also be shown that the broker had no authority from his employer to make the bargain which he has entered in his book. *Peltier v. Collins*, 3 Wend. 459, 467; *Coddington v. Goddard*, *supra*.

(y) Holt 172.

(z) M. & M. 43.

(a) 1 Car. & K. 20.

(b) 9 M. & W. 802.

(c) 2 Camp. 337.

(d) 6 B. & C. 117

(e) 11 Ad. & E. 509.

(f) 6 B. & C. 117.

(g) 20 L. J., Q. B. 529; 17 Q. B. 115

14. *Clen v. McPherson*, 1 Bosw. 480.

Either note
will suffice un-
less variance
shown.

the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in *Hawes v. Forster*, (h) of the Common Pleas in *Parton v. Crofts*, (i) [and of the Common Pleas Division in *Thompson v. Gardiner*.] (j) ¹⁵

§ 298. *Fifthly*.—Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. *Hawes v. Forster* (h) is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in *Parton v. Crofts*, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

Where plaintiff
offers one note,
defendant may
offer the other
to show vari-
ance.

§ 299. *Sixthly*.—As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions, that this entry will in general control the case, because it constitutes the contract, of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a *new* contract modifying that which was entered in the book. This is the point established by *Hawes v. Forster* (f) according to the explanation of that case first given by Parke B., in *Thorn-ton v. Charles*, (g) afterwards by Patteson, J., in *Sievwright v. Archibald*, (h) and adopted by the other judges in this last-named case. ¹⁶

(h) 1 Mood. & Rob. 368.
(i) 16 C. B. (N. S.) 11; 33 L. J., C. P. 189.

(j) 1 C. P. D. 777.
15. *Butler v. Thomson*, 92 U. S. 412; *Newberry v. Wall*, 84 N. Y. 576. In this case there was a signed entry in the broker's book, but there is no discussion of its effect. See comment on this de-

cision in note 12, *supra*; *Remick v. Sandford*, 118 Mass. 102; *Dike v. Reitlinger*, 23 Hun 241.

(f) 1 Mood. & R. 363.

(g) 9 M. & W. 802.

(h) 17 Q. B. 115; 20 L. J., Q. B. 529
16. *Peltier v. Collins*, 3 Wend. 459; *Coddington v. Goddard*, 13 Gray 436, 442.

§ 300. *Seventhly*.—If the bargain is made by correspondence, and there is a variance between the agreement thus concluded, and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry, and the bought and sold notes, as decided in *Heyworth v. Knight*. (i) ¹⁷

Variance between a written correspondence and bought and sold notes.

§ 301. *Eighthly*.—If the bought and sold notes vary, and there is no signed entry in the broker's book nor other writing showing the terms of the bargain, there is no valid contract. ¹⁸ This is settled by *Thornton v. Kempster*, (k) *Cumming v. Roebuck*, (l) *Thornton v. Meux*, (m) *Grant v. Fletcher*, (n) *Gregson v. Rucks*, (o) and *Siewewright v. Archibald* (h) The only opinion to the contrary is that of Erle, J., in the last-named case. In one case, however, at Nisi Prius, *Rowe v. Osborne*, (p) Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor which did not correspond with the note signed by the broker and sent to the defendant.

Variance between bought and sold notes where there is no signed entry.

Where note signed by party varied from note by broker.

§ 302. *Lastly*.—If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. ¹⁹ This was decided in *Hodgson v.*

In sale by broker on credit, vendor may retract, if purchaser's name is unsatisfactory.

(h) 17 Q. B. 115; 20 L. J., Q. B. 529.

(i) 17 C. B. (N. S.) 298; 33 L. J., C. P. 298.

17. Where two agreements were signed for the same purchase at the same time, one printed, the other written, the latter containing a modification of the other, parol evidence was admitted to show that the written agreement contained the true contract. *Hill v. Miller*, 76 N. Y. 32.

(k) 5 Taunt. 786.

(l) Holt 172.

(m) 1 M. & M. 43.

(n) 5 B. & C. 436.

(o) 4 Q. B. 747.

(p) 1 Stark. 140.

18. See *ante* § 222, note 6. *Bacon v.*

Eccles, 43 Wis. 227, 241; *Butters v. Glass*, 31 U. C. Q. B. 379. In this last case the court says that aside from any question of the statute of frauds, there was no contract, because of the variance between the bought and sold notes. In *Suydam v. Clark*, 2 Sandf. Super. 133, the "sold note" provided that seven hundred and fifty barrels of a lot of one thousand should be delivered within three days; the "bought note" that the whole one thousand should be delivered within three days. *Held*, a fatal variance. See *Canteberry v. Miller*, 76 Ill. 355.

19. In *Sumner v. Stewart*, 69 Penna. 321, a broker authorized to buy oil for future delivery, closed a contract without sub-

Davies, (g) and as the special jury spontaneously intervened in that case, and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof, (s) but it would certainly be more prudent to offer evidence of the usage.

§ 303. A singular point was decided in *Moore v. Campbell*. (t) A broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing, "I have this day sold through you to Mr. Moore, &c., &c." The terms stated in this letter varied from those in the sold note sent to the defendant. The court held that these were not bought and sold notes by a broker of both parties, and that the broker was acting for the plaintiff alone. The plaintiff's counsel contended that the defendant's letter was sufficient proof of the contract to bind him, and must be taken to be his own correction of the sold note made by the broker, and binding on him. But the court held that although this was true if the intention of the parties was that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff was also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury. 20

§ 304. A mere difference in the *language* of the bought and sold notes will not constitute a variance, if the *meaning* be the same, and evidence of mercantile usage is admissible to

mitting the name of the seller. The buyer on receiving the name refused to accept the seller. *Held*, on proof of custom, that the buyer was not bound until a seller approved by him was offered him. In *Thomas v. Kerr*, 3 Bush 619, an auctioneer selling horses and cattle on a farm, received from a servant and sold property of another, supposing that it was that of his employer. The buyer learning that it was not the property of his supposed vendor, repudiated the purchase. It was held an invalid sale, first, because the auctioneer was entitled to know who his principal was, lest he should make himself personally liable by

selling for an undisclosed principal; secondly, because the buyer was entitled to know from whom he was obtaining title.

(g) 2 Camp. 531.

(s) See *Brandao v. Barnett*, 3 C. B. 519, on appeal to H. of L.; S. C., 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, 1 Sm. L. C. 602, (ed. 1879.)

(t) 23 L. J., Ex. 310; 10 Ex. 323.

20. Where the broker does not make the contract, but merely brings the parties together, and they agree upon the sale, the broker's entry in his book will bind neither. *Aguirre v. Allen*, 10 Barb. 74.

explain the language and to show that the meanings of the two instruments correspond. The cases in illustration are collected in the note. (u) variance, if meaning is the same

And where the contract made by the broker was one for the exchange or barter of goods, and he wrote out the contract in the shape of bought and sold notes, giving to each party on a single sheet a bought note for the goods he was to receive and a sold note for the goods he was to deliver, it was held no variance that the day of payment was specified at the end of both notes on one sheet, and at the end of the bought note only on the other. (x) MacLean v. Dunn.

§ 305. The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed in behalf of the party so revoking; (y) but after the signature of the duly-authorized broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be that mentioned *supra*, § 302, where a credit sale has been made to an unnamed purchaser, in which event custom allows the vendor to retract if, on inquiry within reasonable time after being informed of the name, he disapproves the sufficiency of the purchaser. 21 Revocation of broker's authority.

§ 306. And where a broker had, reluctantly and after urgent persuasion by the vendor, made an addition to the sold note, after both the bought and sold notes had been delivered to the parties and taken away, the vendor's contention that this addition was simply inoperative was overruled, and the court held that the fraudulent alteration of the note destroyed its effect, so that the vendor could not recover on it. (z) And the effect would Subsequent alteration of sold note.

(u) *Bold v. Rayner*, 1 M. & W. 342; the pleasure of the principal. *Blackstone* and per *Erle, J.*, in *Siewewright v. Archibald*, 20 L. J., Q. B. 529; 17 Q. B. 115; *Rousmanier*, 8 Wheat. 174, 201. Such an agency is dissolved by the death of the principal. *Galt v. Galloway*, 4 Peters 332; *Clark v. Courtney*, 5 Id. 319. But a principal cannot put an end to an agency coupled with an interest, such as a factor's lien for advances, nor will the death of the principal terminate it. *Hunt v. Rousmanier*, 8 Wheat. 174; *Merry v. Lynch*, 68 Me. 94.

(x) *MacLean v. Dunn*, 4 Bing. 722-4.

(y) *Farmer v. Robinson*, 2 Camp. 339 n.; *Warwick v. Slade*, 3 Camp. 127.

21. The authority of a broker may be revoked, because a broker's agency is not coupled with an interest in the thing to be sold, and such agency is revocable at

(z) *Powell v. Devit*, 15 East 29.

be the same in the case of a material alteration even not fraudulent. (a)²²

§ 307. In *Henderson v. Barnewall*, (b) where the parties contracted in person in presence of the broker's clerk, who had brought them together on the exchange, and one, in the hearing of the other, dictated to him the terms of the agreement, it was held by all the Barons of the Exchequer that the agency of the clerk was *personal*, and that neither an entry of the bargain in the broker's books nor a sale note signed by him would satisfy the statute, because the clerk could not delegate the agency to his employer. ²³

(a) *Mollett v. Wackerbath*, 5 C. B. 181; *rescind his sale when effected. Ghirardelli v. McDermott*, 22 Cal. 539; *Adrian v. Lane*, 13 S. C. 183.

22. An alteration by a stranger, or an immaterial alteration, will not prevent a recovery on the writing thus altered. *Nichols v. Johnson*, 10 Conn. 192, 198. An agent, like a broker, simply empowered to sell, has no authority to modify or

(b) 1 Y. & J. 387.

23. In *Williams v. Woods*, 16 Md. 220, it was held that where the clerk of a broker signed, in his presence and by his direction, the signing was valid.

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

	SEC.		SEC.
Preliminary remarks.....	308	Division of the subject.....	312

§ 308. After a contract of sale has been formed, the first question which suggests itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement?

We have already seen (a) that the distinction between the two contracts consists in this, that in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor, whereas in the executory agreement, the goods remain the property of the vendor till the contract is executed. In the one case, A sells to B: in the other, he only promises to sell. In the one case, as B becomes the owner of the goods themselves, as soon as the contract is completed by mutual assent, if they are lost or destroyed, he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has at common law no other remedy for breach of the contract, than an action for damages.¹

(a) *Ante* §§ 3, 78.

1. In *Hatch v. Oil Co.*, 100 U. S. 124, a sale of personal property except the mutual assent of the parties to the con-

§ 309. Both these contracts being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*.² But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case, the courts have applied certain rules of construction, which in most instances furnish conclusive tests for determining the controversy.³

tract. As soon as it was shown by competent evidence, that it was agreed by mutual assent, that the one should transfer the absolute property in the thing to the other, for a money price, the contract was considered as completely proven, and binding on both parties. If the property, by the terms of the agreement, passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time, or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement." As title does not pass, on an executory contract of sale, it follows that an executed sale of goods by the owner transfers good title against one with whom the vendor has made a previous executory agreement to sell the same goods. *Elliott v. Stoddard*, 98 Mass. 145. And this is true even though the first buyer has advanced money on the goods. Thus where a manufacturer bought materials on credit and received cash from a dealer, and agreed to return the manufactured product to the dealer to be applied on the debt, it was held that the dealer had no property in the goods, and that a purchaser from the manufacturer obtained good title. *Dittmar v. Norman*, 118 Mass. 319; *Powder Co. v. Burkhardt*, 97 U. S. 110.

2. Thus a seller of a quantity of ice expressly reserved title until the whole

price should be paid, meantime permitting the buyer to take ice from time to time, on making certain payments when each ton was taken. The ice being destroyed by fire, it was held that the seller was still owner and must bear the loss, and repay to the buyer his money advanced for ice not delivered. *Weed v. Boston, &c., Ice Co.*, 12 Allen 377.

3. The Intention of the Parties Determines when the Property Passes.—In *Elgee Cotton Cases*, 22 Wall. 180, 187, Strong, J., said: "It must be admitted there is often great difficulty in determining, whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is, doubtless, true that whether the property passes or not is dependent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument." In *Hatch v. Oil Co.*, 100 U. S. 124, 131, Clifford, J., said: "The question is rather one of intention than of strict law, the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter and the attendant circumstances." In *Terry v. Wheeler*, 25 N. Y. 520, 525, where the inquiry was whether the property had

§ 310. When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A buys from B ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B, and to have become the property of A. ⁴

§ 311. But on the other hand, the goods sold may be specific, as if there be in the case supposed only ten sheep in a flock, and A agrees

passed at the time of the contract of sale, Selden, J., said: "The questions which arise in such cases as to sales are questions of intention, such as arise in all other cases of the interpretation of contracts; and when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law. In *Callaghan v. Myers*, 89 Ill. 566, 570, it was argued that a sale was not complete because no price had been fixed; but Walker, J., said: "Whether the sale is executed, and the title passes to the buyer, depends on the intention of the parties, and that may be shown by circumstances as well as declarations." In *Sewell v. Eaton*, 6 Wis. 490, it was held "that if it clearly appear to have been the intention of the parties that the property should be deemed to be delivered, and the title to have passed, and especially if their acts be inconsistent with any other view, the mere fact that something remains to be done will not govern such intention." This was quoted and approved in *Fletcher v. Ingram*, 46 Wis. 191, 201, where other cases to the same effect are cited.

4. Can there be a Present Sale where the Goods Sold are not Specifically Identified.—Our author says it is clear that there cannot be; but the state-

ment cannot be accepted without qualification in the United States. If the seller contracts to sell property which he does not yet own, or which he is to manufacture, clearly he can pass no title. But where he owns property, and holds it ready for delivery, and sells a part of it without specifying which part, it is plain that if the parties so intend they may become owners in common of the whole, the buyer and seller each having an undivided interest. In such cases the goods sold are specific to this extent, that they are to be taken from a specific lot. Such a sale is on the border line between a sale of an unascertained or non-existing chattel and a sale of a specific, selected chattel; and it is often apparent that the parties intend an immediate transfer of ownership. Many American cases of authority have accordingly held, that where the property sold is part of an ascertained mass of *uniform quality and value*, severance is not necessary to vest the title to the part sold in the vendee. See *Chapman v. Shepard*, 39 Conn. 413; *Cushing v. Breed*, 14 Allen 376; *Kimberley v. Patchin*, 19 N. Y. 330; *Piazzek v. White*, 23 Kan. 621; *Russell v. Carington*, 42 N. Y. 118; *Pleasants v. Pendleton*, 6 Rand. 473; *Waldron v. Chase*, 37 Me. 414; *Hurff v. Hires*, 40 N. J. L. 581; and see *post* § 469.

to buy them all. In such case, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price, by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the vendor's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions; because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case, there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel.⁵

5. In *Hurd v. Cook*, 75 N. Y. 454, 458, and there was a provision that all the the sale was of logs to be cut by the buyer logs should belong to the buyer. Hand, on the land of the seller, to be sawed by J., said: "There certainly is no rule of the seller, and, after they were sawed, law to prevent this transfer of title taking payment was to be made for the lumber; effect according to the stipulation of the

§ 312. The authorities which justify these preliminary observations (b) will now be reviewed, thus placing before the reader the means of arriving at an accurate knowledge of ^{Division of} ~~the subject.~~ this important branch of the law relating to the sale of personal property. They will be considered in five chapters, having reference to cases.

1. Where the sale is of a specific chattel, unconditionally.
2. Where the chattels are specific, but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

The effect of obtaining goods by fraud, upon the transfer of the property in them, will be considered in Book III., Ch. II., On Fraud.

parties." "The case is easily distinguishable from *Stephens v. Santee*, 49 N. Y. 35. In that case, according to the statement of Grover, J., the owner of land sold one thousand ties to the defendant at twelve cents apiece, which such owner was to cut and deliver; and the ties were to be inspected, and the defendant to take only such as were merchantable. There was a verbal stipulation that the title to the ties, necessarily the one thousand merchantable ones, and no other, was to vest in the defendant as soon as the timber was cut. This court held in favor of creditors of the owner, that title did not pass, nevertheless, until the ties were inspected and culled, and those merchantable selected, because, of necessity, they could not be ascertained before that time. The court expressly distinguishes the case from those where

the title to all the property, irrespective of selection, was to pass." In *Lingham v. Eggleston*, 27 Mich. 324, 328, the language of our author in the text on the question of intent was quoted and approved by Cooley, C. J. See *Hatch v. Oil Co.*, 100 U. S. 124, 131. The intent is often a question for the jury. *Riddle v. Varnum*, 20 Pick. 280; *Wilkinson v. Holiday*, 33 Mich. 386; *Merchants' Bank v. Bangs*, 102 Mass. 291. And as the parties may, if they choose, pass title to property while something yet remains to be done to it by the seller, so they may reserve title to the seller even though it has passed in its complete form into the possession of the buyer. See § 366, *post*.

(b) In *Heilbutt v. Hickson*, L. R., 7 C. P. 438, Bovill, C. J., laid down the general law on this subject, substantially as it is stated in the above text.

CHAPTER II.

SALE OF SPECIFIC CHATTELS UNCONDITIONALLY.

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§ 313. Shepherd's Touchstone, p. 224, gives the common law rules as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, *First*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or *Secondly*, all; or, *Thirdly*, part of the money is paid in hand; or, *Fourthly*, I give earnest money, albeit it be but a penny, to the seller; or, *Lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these

Common law
rules in Shep.
Touch.

cases there is a *good bargain and sale of the thing to alter the property thereof*. In the *first* case I may have an action for the thing, and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money."

§ 314. In Noy's Maxims, (a) the rules are given thus: "In all agreements there must be *quid pro quo presently*, except ^{In Noy's Maxims.} a day be expressly given for the payment, or else it is *nothing but communication*. * * * If the bargain be that you shall give me £10 for my horse, and you gave one penny in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is £4, and you say you will give me £4 and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract*; but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. * * * If I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered, *yet the property of the horse is by the bargain in the bargainee or buyer*; but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue, and if the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because *by the bargain the property was in the buyer*."

§ 315. The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy, that unless the money be paid "presently" there is no sale except a day be *expressly* given for the payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days the actual payment of the price, but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention. In *Simmons v. Swift*, (b) Bayley, J., said: "Generally, where a bargain

Modern rules the same with one exception.

Consideration for transfer is the promise to pay, not the actual payment of price.

(a) pp. 87-9.

(b) 5 B. & C. 862.

On sale of specific chattels, title vests in buyer immediately.

is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." So in *Dixon v. Yates*, (c) Parke, J., said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself, *the vendor appropriates to the vendee a specific chattel*, and *the latter thereby agrees to take that specific chattel* and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel *is equivalent to delivery by the vendor*, and *the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession*. *The effect of the contract, therefore, is to vest the property in the bargainee.*"¹

§ 316. The principles so clearly stated by these two eminent judges are the undoubted law at the present time. (d) Thus, in *Tarling v. Baxter*, (d) the defendant agreed to sell to the plaintiff a certain stack of hay for £145, payable on the ensuing 4th

(c) 5 Ad. & E. 318, 340.

1. See § 318, *post*. *Leonard v. Davis*, 1 Black 476, 483; *De Foulcar v. Shottenkirk*, 3 Johns. 170; *Jenkins v. Jarrett*, 70 N. C. 255. "As between vendor and vendee it is specification and not delivery that is necessary to the vesting of title." *Lowrie, J.*, in *Winslow v. Leonard*, 24 Penna. 14, 17. *Bonn v. Haire*, 40 Mich. 404; *Uhl v. Robinson*, 8 Neb. 272, 278; *Wade v. Moffett*, 21 Ill. 110; *Seckel v. Scott*, 66 Ill. 106; *Kohl v. Lindley*, 39 Ill. 195; *Brown v. Wade*, 42 Iowa 647; *Taylor v. Twenty-five Bales of Cotton*, 26 La. Ann. 247; *Cunningham v. Ashbrook*, 20 Mo. 553, 556; *Goddard v. Binney*, 115 Mass. 450, 455; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Gough v. Edelen*, 5 Gill 101. In *Barrett v. Goddard*, 3 Mason 107, 110, it appeared that cotton had been sold on

six months' credit, (a note being given), and, by agreement, remained in the seller's warehouse, with his consent, storage free. Before the expiration of the term of credit the buyer failed, and transferred the cotton to trustees for his creditors, who brought trover for the cotton against the seller. *Story, J.*, said: "When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is transferred to the vendee, and the price is due to the vendor." And the suit was sustained.

(d) *Hinde v. Whitehouse*, 7 East 553; *Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Spartali v. Benecke*, 10 C. B. 212; *Gilmour v. Supple*, 11 Moo. P. C. 551; *The Calcutta Company v. De Mattos*, 32 L. J., Q. B. 322; *Wood v. Bell*, 6 E. & B. 355; 25 L. J., Q. B. 148, and in *Ex. Ch.* 321; *Cham-*

of February, and to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, although there was also a stipulation that the hay was not to be cut till paid for. Bayley, J., said: "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, *the property in the thing sold vests in the vendee.*" This case was followed by one, presenting very similar features, in the Queen's Bench in 1841. (e)

§ 317. In *Gilmour v. Supple*, (f) Sir Cresswell Cresswell, in giving an elaborate judgment of the Privy Council, says: "By the law of England, by a contract for the sale of specific ^{Gilmour v. Supple.} ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." And in the *Calcutta Company v. De Mattos*, (g) in 1863, Blackburn, J., pronounced this to be "a very accurate statement of the law."

AMERICAN DECISIONS.*

§ 318. The rule that the contract of sale passes the property immediately, before payment or change of possession, has been universally recognized in the United States. Nevertheless it must be taken with some modification, by reason of the extension by the American courts of the seller's right to rescind, to cases of non-payment. The rule is adopted in favor of the seller, but not in favor of the buyer, and hence is likely to mislead. If accepted to its full extent it involves three conclusions: *First.* That the goods are at the buyer's risk. This is law. *Second.* That the seller is entitled to payment. This is true, unless the seller has agreed to make delivery at some specified time and place, in which case he must first make or tender delivery. *Third.* That the buyer is entitled to possession of the property. This is not law. Payment or tender of payment is essential to entitle the buyer to the possession, unless the seller, by giving credit or surrendering possession, waives the right to hold the goods. The seller has

bars v. Miller, 10 C. B. (N. S.) 125; 32 and 29 L. J., Ex. 180; *Sweeting v. Turner*, L. R., 7 Q. B. 310.
L. J., C. P. 30; *Furley v. Bates*, 2 H. & C. 200; 33 L. J., Ex. 43; *Joyce v. Swan*, (f) 11 Moo. P. C. 566.
17 C. B. (N. S.) 84. (g) 32 L. J., Q. B. 322, 323. *

(e) *Martindale v. Smith*, 1 Q. B. 339. *The rest of this chapter is by the
See, also, *Chinery v. Vial*, 5 H. & N. 228; American editor.

not only a lien on the goods for the price, but, in the United States, on default of payment, may rescind the sale and hold the goods as his own.

In considering these subjects, citations will be classified under the following heads:

- I. When are the goods at the buyer's risk?
- II. Effect, in passing property, of seller's agreement to deliver.
- III. Effect, in passing property, of payment.

SECTION I.—BUYER'S RISK.

§ 319. An agreement for the present sale of specific chattels, without payment or delivery, casts on the buyer the risk of loss. The general rule is succinctly stated by Jewett, J., in *Joyce v. Adams*:² "The common law fixes the risk where the title resides." But, as will be seen from the cases cited under our third division, while the title is considered to be in the buyer for the purpose of throwing upon him the risk of loss, it is considered to be in the seller for the purpose of his protection in case of non-payment.³ The law was expressed in the U. S. Supreme Court, in the case of *Leonard v. Davis*,⁴ by Clifford, J., as follows: "When the terms of sale are agreed on, and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale, says Chancellor Kent, becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment. But if the goods are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him."

§ 320. In *Bissell v. Balcom*,⁵ cattle were sold for \$290, on account of which \$5 was paid. The cattle were left in the seller's pasture, to be taken by the buyer within three months, but were swept away by a flood. The seller sued for the price. Woodruff, J., said: "This constituted a present sale of the property at the common law, by which title passed to the purchaser, and by which the vendor's right

2. 5 N. Y. 291, 296.

3. *Post* § 335, *et seq.*

4. 1 Black 476, 483.

5. 39 N. Y. 275, 279. See *Hayden v. Demets*, 53 N. Y. 426, 431; *Morey v. Medbury*, 10 Hun 540.

to the purchase money was perfect. To the binding effect of such a sale, at the common law, delivery of the property is not necessary to vest the title in the purchaser, or to place the property at his risk, nor is it necessary that actual payment of any part of the price should be made. On the contrary, the sale may be perfect, the title pass, and the property be at the risk of the purchaser, and yet the vendor retain the possession, and have complete right to retain the possession until the price is paid, and to compel payment before delivery."

In *Ruthrauff v. Hagenbuch*,⁶ the seller sued for the price of tobacco raised by him as tenant on the buyer's farm, and sold for fourteen cents per pound, and the buyer agreed to pay as much more as he could realize on sale of the tobacco. At the time of the sale the tobacco was stored in sheds on the farm, and continued there until carried away by a flood. *Held*, that the loss must be borne by the buyer.

In *Seckel v. Scott*,⁷ the sale was of a lot of butter in the seller's store. The buyer took away part, and the residue was destroyed in the Chicago fire. The buyer sued to recover back a part payment, but it was held that the title and risk of loss were in him, though the firkins had not been weighed. See *Barrow v. Window*,⁸ where it was held that a buyer of sheep could not refuse them because they had become diseased while left in the seller's possession.

§ 321. *Willis v. Willis*⁹ was a case of an agreement to exchange slaves, one for another. Each being a child, was left with its mother, and one died. Detinue was brought for the other, and the defence was that there had been no delivery. But Ewing, J., said: "The right of property and right of possession vested immediately, and the risk devolved on each of the owners." And it was said further, that if there was a condition mutually to deliver possession, the seller of the deceased slave was excused from performance by act of God.

In *Sweeney v. Owsley*,¹⁰ suit was brought for the price of a mule colt. At the time of the sale \$5 was paid, and nothing was said as to the time of payment of the balance. It was agreed that the colt should remain with the mare till weaning time, but before that time it died. Crenshaw, J., said: "So soon as a bargain of sale of specific personal property is struck, the contract becomes absolute,

⁶. 58 Penna. 103. See *Scott v. Wills*,
6 S. & R. 368.
⁷. 66 Ill. 106.

⁸. 71 Ill. 214.
⁹. 6 Dana (Ky.) 48.
¹⁰. 14 B. Mon. 413.

without actual payment or delivery, and the property, and risk of accident to it, is in the buyer. Nothing being said as to the time of payment of the balance of the consideration, we take it that this balance was to be paid on the delivery of the mule, and had it lived the vendor would not have been bound to surrender possession until payment. Notwithstanding it may have been necessary, had the colt lived, that the vendor should have delivered or tendered it before a right to demand the balance of the purchase would have attached, yet the colt having died, he is excused from such condition." A case precisely similar is that of *Henline v. Hall*.¹¹

§ 322. In *Wing v. Clark*,¹² the bargain was for the purchase of a machine, for which the buyer was to send, and the suit was upon a note for the price. This note was sent by a messenger, with orders not to leave it unless he got the machine; but the messenger voluntarily gave the note and left the machine, which was soon after destroyed by fire. Whitman, C. J., said: "Independent of any actual delivery of the article, here was a binding contract of sale." And he refers to Blackstone for the proposition "that the goods, so under a contract of sale, are at the risk of the vendee till paid for and taken away; and if destroyed by accident in the meantime the vendor may recover the price."

In *Phillips v. Moor*,¹³ an offer by letter was made for hay in the seller's barn, and the seller wrote back accepting it. Soon after the hay was burned. The court held the buyer liable for the price, following *Wing v. Clark*.

In *Townsend v. Hargraves*,¹⁴ a quantity of wool in a warehouse in Boston was sold by an oral agreement, the buyer consenting to accept the invoice weight, neither buyer nor seller having ever seen the wool, but examining samples. The warehouseman sent several bales to the buyer in Maine, but most of the wool was burned in the warehouse. On a suit for the price, Colt, J., said: "It is well settled that by such a contract, independently of the statute of frauds, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." And the court held that the risk of loss was on the buyer, and the seller could recover the price.

§ 323. In *King v. Jarman*,¹⁵ the seller accepted an offer for cotton

11. 4 Ind. 189.

12. 24 Me. 366, 372.

13. 71 Me. 78, 81.

14. 118 Mass. 325, 332.

15. 35 Ark. 190, 197.

stored in a warehouse, and gave the buyer an order on the warehouseman. Before the buyer could obtain the actual possession of the cotton it was destroyed by fire. The buyer was to weigh the cotton, and give the seller proper credit on the buyer's books. The court held that these facts showed an intent to pass title at once. The seller "trusted defendants to make proper credits and advise him of the weights. Evidently the defendants did not wish or expect him to do anything more. They should bear the loss." See *Terry v. Wheeler*, stated in § 330, *post*, and see cases cited in note. 16

§ 324. In those states where the statute of frauds as to sales of goods is in force, a sale for more than the price limited by the statute, will not be effectual to transfer the property, unless there is either payment or acceptance and receipt, or a signed writing. See *ante* Book I., Part II. But, as we have seen, in Massachusetts and some other states, compliance with the statute subsequent to the contract, operates retrospectively, and the property is considered at the buyer's risk from the date of the oral bargain. See § 91, note 2, *ante*.

But the contract must comply with the statute of frauds.

In many of the states and in the federal courts a sale of goods is considered void as to the creditors of, or *bona fide* purchasers from the seller, until actual possession is delivered to the buyer, although such sale passes the property at once as between the parties. See *post* Book III., Chap. II., on "Fraud."

Validity of sale as to creditors.

SECTION II.—EFFECT OF SELLER'S AGREEMENT TO DELIVER.

§ 325. The effect of an agreement in the contract of sale, that the seller shall deliver the property sold at some particular place, is sometimes to postpone the vesting of title in the buyer until such delivery is made.

Effect in passing property of seller's agreement to deliver.

In the absence of any agreement, express or implied, as to delivery by the seller, the buyer must come and take the property bought by him at the place where it is when sold. See *post* Book IV., Part II., Chap. II. If the seller has not agreed to deliver, he may sue for the price, though the goods remain in his possession. 17

The recovery in such case is on the common counts for goods bar-

16. *Terry v. Wheeler*, 25 N. Y. 520; 17. *Wade v. Moffett*, 21 Ill. 110; *Kohl Smith v. Dallas*, 35 Ind. 255; *Thayer v. Lindley*, 39 Ill. 195; *Bissell v. Balcom*, 13 Allen 26; *Williams v. Corbey*, 5 Ont. App. 626. 39 N. Y. 275, 279.

gained and sold. Delivery is essential to support the count for goods sold and delivered. 18

Delivery in performance of the contract, such as will constitute a defence to a suit by the buyer for non-performance, is discussed *post* Book IV., Part II., Chap. II. Here we consider its effect in passing property. The general rule is that if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery, title will not pass until such delivery. See *infra*, § 377. Slight evidence, however, is accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery.

The following decisions illustrate the general rule, and the exceptions will next be considered :

§ 326. In "The Venus" 19 a cargo was shipped at Liverpool for New York, after war had been declared by the United States against Great Britain. The vessel was captured. The goods were claimed by the consignees, who were American citizens. The captors claimed them as the property of the consignor, who was an enemy. Washington, J., said: "If the thing agreed to be sold is to be sent by the vendor to the vendee, it is necessary, to the perfection of the contract, that it should be delivered to the purchaser or to his agent." It was therefore held that the title was in the enemy, and the capture was held good.

In *Sneathen v. Grubbs*, 20 the seller agreed to load for the buyer two of the buyer's barges of coal, to be delivered by the seller at Pittsburg, and paid for on delivery. The barges were loaded, but before they could be floated to Pittsburg the coal in them was attached by the seller's creditors, against whom the buyer brought replevin. The suit was not sustained. The court said: "Delivery of the coal had not taken place, and all the terms of the contract of sale had not been performed. No title to the coal passed which could be enforced in replevin by the purchasers."

§ 327. In *Commonwealth v. Greenfield*, 21 a liquor dealer, licensed to sell liquor in Pittsfield only, was convicted for selling at Lee. At the hearing on exceptions it appeared that the buyer at Lee sent an

18. 1 Chitty Pl. 345, 347; Turner v. Langdon, 112 Mass. 265; Stearns v. Washburn, 7 Gray 187, 189; Allingham v. O'Mahoney, 1 Pugs. (N. B.) 326. See *post* Book V., Part I., Chap. I., Section II. 19. 8 Cranch 253, 275. 20. 88 Penna. 147, 150. See Fry v. Lucas, 29 Penna. 356; McCandlish v. Newman, 22 Penna. 460. 21. 121 Mass. 40.

order to the seller as follows: "Bring me down twenty dozen bottles of lager, and come as soon as you can, as I am all out." The seller thereupon filled enough bottles to satisfy the order, set them apart for the buyer, and on the same day carried them to him. The seller claimed that the sale took effect to pass the property at Pittsfield at the time he set apart the bottles. But Gray, C. J., said: "The evidence, to say the least, warranted the inference that the defendant did not intend to part with the title until he actually delivered the goods at Lee, according to the terms of the order. If such was the fact, the goods, while in the wagon of the seller, remained his property and at his risk, and the sale was completed at Lee and not at Pittsfield."

In *Suit v. Woodhall*,²² the suit was for the price of whiskey sold by dealers in Kentucky to buyers in Massachusetts. If the sale took place in the latter state it was void under the liquor law. The order had been given to an agent of the seller in Massachusetts, and the whiskey was delivered to carriers in Kentucky and transported by them to the buyer in Massachusetts. Morton, J., said: "There was evidence from which the jury might have found that the plaintiffs were to pay the freight, and the defendants asked the court to rule that if the plaintiffs were to deliver the liquors to the defendants at Lawrence, the sales were made in Lawrence. This instruction should have been given. Delivery to the carrier was a delivery to the defendants, if there was no agreement to the contrary. But if the parties agreed that the goods were to be delivered in Lawrence, it would not be a completed sale until delivery, and the laws of this state would apply to it."

§ 328. In *Devine v. Edwards*,²³ milk was sent to the buyer in Chicago by railroad, from day to day, and paid for by the gallon, estimating eight gallons to the can. The buyer claimed to recover back part of his payments because the cans, when delivered, did not contain eight gallons, some of the milk having been spilled in transit. Sheldon, J., said: "We incline to think that where it is the express contract that the property is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, then the place of delivery is the business place of the purchaser. If Chicago

²² 113 Mass. 391, 394.

560, 564; *Pierson v. Hoag*, 47 Barb. 243;

²³ 101 Ill. 138. See further on this *Underhill v. Muskegon Boom Co.*, 40 Mich. 660; *Thompson v. Cinn. R. R.*, 180 192; *Halliday v. Hamilton*, 11 Wall. Bond 152.

was the place of delivery, the quantity of milk in the cans upon their arrival at Chicago was the quantity to be considered as having been actually received by the purchaser."

§ 329. But the property passes at once on the sale, if such is the intent, though the seller is afterwards to make a delivery of the goods. Such intent may be expressly declared, or may be inferred from the circumstances. Thus in *Lynch v. O'Donnell*,²⁴ the seller was licensed to sell liquor at his store only. Liquor was ordered by a dealer in another town, under a previous arrangement whereby the seller agreed to deliver goods so ordered at the depot addressed. Having so delivered, the seller brought an action for the price. It was contested as an illegal sale, but on evidence that the seller expressly declared at the time of the contract, "the sales are to be made at my store," a verdict for the price was sustained.

§ 330. In the absence of an express agreement, the intent that title shall pass at once by the contract, although the seller is to deliver, is inferred where the buyer is to give notice of time or place of delivery, where payment in full is made, where the buyer employs the seller to remove the property, or where there is other evidence that the continued possession of the seller is merely for the convenience of the buyer, or that the removal of the goods is made by the seller as agent for the buyer. *Terry v. Wheeler*,²⁵ is a case often cited on this topic. In that case the sale was of lumber, which was selected by the buyer and measured, and piled in the yard of the seller; and the price was paid. The seller agreed to deliver it on the cars free of charge, no time being specified. The lumber was destroyed by fire on the day of sale, and the buyer sued to recover back the price. *Selden, J.*, said (25 N. Y. 525): "No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place, prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed,

²⁴ 127 Mass. 311. Compare *Commonwealth v. Greenfield*, § 327, *supra*. sell, 84 N. Y. 549, 555; *Gray v. Mayor of New York*, 46 N. Y. Super. Ct. 494.

²⁵ 25 N. Y. 520. See *Hunter v. Wet-*

The property passes before delivery, if such is the intent.

The intent may be inferred from circumstances.

and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it, the seller acts as bailee and not as owner."

§ 331. In *Hobbs v. Carr*,²⁶ a quantity of ashes on the seller's land was sold, and at the time of sale the buyer requested the seller to procure leave to place them on certain premises of a third party. The buyer procured the license and commenced removing the ashes, when they were seized by his creditor. *Held*, that the seller in removing the ashes was the buyer's agent, and that title had passed at the sale.

In *Weld v. Came*,²⁷ a billiard-table was ordered to be manufactured and delivered at a certain wharf. When ready for delivery the seller notified the buyer, who paid for it and said he would give notice when a vessel was ready to take it. Soon after, it was destroyed by fire in the seller's store-room. The buyer sued to recover back the price. Chapman, J., said: "The defendants were to transport the property to the wharf, and this is a circumstance to be considered by a jury as tending to show that the property was not delivered. But it is not conclusive, and the other circumstances so far explain it that a jury would be authorized to find that the sale was completed by the arrangement that the defendants should store it till a ship should be ready to receive it." *Held*, that the question whether title had passed must be left to the jury.

In *Lingham v. Eggleston*,²⁸ Cooley, J., said: "Even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, loading the goods upon a vessel, the property may pass by the contract of sale." In *Dyer v. Libby*²⁹ hay was sold to be baled by the buyer at the seller's barn, and then to be hauled by the seller to the railroad station. The hay was baled and marked with the buyer's name, and remained in the seller's barn to be hauled when called for by the buyer. It was held that the evidence warranted a verdict that the title passed at the barn.

§ 332. In the States of Maine and Michigan it has been held in several cases that a contract for a sale of logs, accompanied by a sur-

26. 127 Mass. 532.

Whitney, 24 Mich. 486; Newcomb v.

27. 98 Mass. 152. See *Higgins v. Cabell*, 10 Bush 460, 468; *Shelton v. Cheesman*, 9 Pick. 7. Franklin, 68 Ill. 333, 338.

28. 27 Mich. 324. See *Whitcomb v.* 29. 61 Me. 45.

vey, and marking them with the purchaser's mark by a third person, passes the title, though the seller agrees to deliver them at another place than that of survey.³⁰ In one of these cases, *Bethel Steam Mills Co. v. Brown*,³⁰ Barrows, J., said: "The merchandise sold may remain in possession of the seller for certain specific purposes, among which are transportation and delivery at another place, where the property in it has actually passed from him, and vested in the purchaser, without affecting the validity of the sale."

§ 333. Property in the goods will pass though they are in the possession of a third person. As to a sale of goods in the possession of one who holds them wrongfully, see *ante* § 6, note 1. Where the goods were in the possession of the seller's bailee, we have seen (*ante* § 174) that notice to such bailee and his assent was needful to constitute an acceptance and receipt to satisfy the statute of frauds. But if the statute is otherwise satisfied, as by part payment or signing a memorandum, the title passes without notice to the bailee.³¹ Thus, in *Gibson v. Stevens*,³² the sale was by transfer of a warehouse receipt, and the court adjudged that "it transferred to the vendee the legal title and constructive possession of the property, and the warehouseman, from the time of the transfer, became his bailee."³³

Goods in possession of a third person.

SECTION III.—EFFECT OF PAYMENT IN PASSING PROPERTY.

§ 334. Where it is agreed on a sale that title shall not pass until payment, such sale will be conditional, and the property will remain in the seller, even though possession is given to the buyer. See § 366, *post*. But it must not be inferred that in the absence of any condition in the contract of sale, the buyer can take the property vested in him without payment.

The seller retains a lien on the goods for the price, and may hold them until paid; but if the sale is on credit, the seller cannot retain the goods, unless they still continue in his

Seller's lien.

30. *Boynton v. Veazie*, 24 Me. 286; *How v. Barker*, 8 Cal. 614; *Nat. Bank v. Bethel Steam Mills Co. v. Brown*, 57 Me. Walbridge, 19 Ohio St. 419; *Newcomb v. 9; Underhill v. Boom Co.*, 40 Mich. 660; *Cabell*, 10 Bush 460, 468; *Townsend v. Muskegon Boom Co. v. Underhill*, 43 Hargraves, 118 Mass. 325, 332; *Davis v. Mich. 629. Russell*, 52 Cal. 611. A ginner's receipt for cotton stands on the same footing.

31. *Crill v. Doyle*, 53 Cal. 713.

32. 8 How. 400.

33. See *Burton v. Duryea*, 40 Ill. 325; *Jarman*, 35 Ark. 190.

Puckett v. Reed, 31 Ark. 131; *King v.*

possession at the time when the term of credit has expired. See *post* Book V., Part I., Chap. IV.

This remedy, of a lien, seems to be the only remedy in England against the goods on an unconditional sale, except that of stoppage *in transitu*, which is an extension of the lien. The seller cannot rescind the sale for non-payment and resell, either before or after possession is delivered. If he does so, he becomes liable for damages. See *post* Book V., Part I., Chap. I., Section II., and Chap. III. And in the American, as well as in the English, courts it is held that the seller cannot rescind if he makes a voluntary delivery of the possession, without requiring payment, in the absence of fraud. But in most, and perhaps all, of the states, by a process of judicial legislation, the right of the seller has been established to rescind a sale for non-payment of the price, when due, in cases where he retains possession, or where he delivers in expectation of immediate payment. This right is in addition to the seller's lien. One result of this is, that the principles stated in the text in the foregoing chapter (§ 315) must be taken with a qualification which may be expressed as follows:

Seller's right
to rescind for
non-payment.

§ 335. *The Seller may Elect to keep the Property as His own on Default of Payment, unless He has Waived the Right.*—This applies to sales to be paid for by note or by cash; and where no time is fixed, the law implies that the terms are cash on delivery.³⁴

This right to rescind for non-payment is sometimes considered as an avoidance of the sale for fraud; but fraud is not essential to its exercise. Our author briefly mentions it as an American remedy, *post* Book V., Part I., Chap. III. It resembles also the cases covered by the third rule as to conditional sales, (§ 366, *infra*), but with this difference, that under the principle we are discussing, the title is in the buyer, for the purpose of throwing upon him the risk of loss of the goods, the seller's title being at his own option to set up. Although the cases following are for the most part based on the ground that title had not passed, it will be seen that it is the seller only who can set up that claim, and that the transaction in nearly every instance would have been held a complete transfer of title, if the seller had so elected.

34. *Wabash Elevator Co. v. Bank of Toledo*, 23 Ohio St. 311, 319; *Allen v. Hartfield*, 76 Ill. 358, 360; *Paul v. Reed*, 52 N. H. 136; *Goldsmith v. Bryant*, 26 Wis. 34; *Fenelon v. Hogoboom*, 31 Wis. 172, 176; *Pickett v. Cloud*, 1 Bailey 362; *Southwestern Freight, &c., Co. v. Stannard*, 44 Mo. 71, 83. All of these cases will be found stated in this chapter, *infra*.

§ 336. In *Copland v. Bosquet*³⁵ wine was sold at Boston and delivered to the buyer's agent there, to be shipped to Philadelphia, payable by six months' acceptance or cash; and it was shipped. No payment being made, replevin was brought by one who stood in the place of the seller, and the suit was sustained. Washington, J., said: "Upon the completion of the contract of sale, and before delivery, the property of the thing sold is changed, and passes to the vendee. But if the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee. * * * If we have rightly construed the contract, it would seem to follow conclusively that the sale was conditional, that is, for cash, or approved paper, and that this condition, whichever of the alternatives was elected by the vendee, was precedent of the sale. For if a sale for cash does, from the nature of the contract, imply a condition precedent, so as to prevent a change of the property until the money is paid, it is very difficult to perceive upon what ground a sale for approved paper should not equally imply a precedent condition."

§ 337. In *Lester v. McDowell*,³⁶ the sale note was as follows:
Pennsylvania decisions. "We have sold all the rye we had, say 1000 or 1200 bushels, to be delivered at the store-house, free of charge, at Owerytown, within ten days, for forty cents per bushel, payable in a note, three months from date." The seller delivered the rye, but the note not being tendered until after ten days, refused to receive it, whereupon the buyer replevied the rye. It was held that the property remained in the seller. Chambers, J., said: "Though time may not generally be of the essence of a contract, and when not observed in the sale of real estate may admit of compensation, yet in the trade and business of merchants, in the purchase and sale of merchandise, of daily or hourly occurrence in a fluctuating market, dependent on demand and supply, time is of the essence of the contract."

In *Henderson v. Lauck*, the seller delivered corn, which he placed in a heap with other corn of the buyer, but the buyer failing to pay on

35. 4 Wash. C. C. 588. See *D'Wolf v. Babbett*, 4 Mason 287; *Smith v. Hamilton*, 29 U. C. Q. B. 394.

36. 18 Penna. 91, 95. See *Clemson v. Davidson*, 4 Binn. 405, and 5 Binn. 392; *Lelar v. Brown*, 15 Penna. 215.

receipt of the last load, the seller brought replevin for the whole, and it was sustained.³⁷ See, also, *Welsh v. Bell*,³⁷ where Strong, J., said: "It is a condition precedent of a sale for cash, in order to pass the property to the vendee, that payment should be made—clearly so, unless there has been delivery."

In *Harris v. Smith*,³⁸ the sale was made at auction and the price was to be paid by approved notes. On the buyer's promise to furnish a particular endorser, the goods were sent to him, but he did not send the notes. The seller brought replevin for the goods and a recovery was sustained. Gibson, J., said: "As to the delivery to the defendant, it is very clear the property was not changed by it."

§ 338. In *Russell v. Minor*,³⁹ goods were sold to be paid for by the note of the buyer. Some of them were delivered, and several days later the remainder and the note demanded, ^{New York decisions.} but refused. The seller thereupon took away the portion last delivered and replevied the others. Bronson, J., in the Supreme Court, held that title had passed to the goods first delivered, but this was reversed on writ of error. The previous cases in New York were reviewed, and it was held a conditional delivery, and that no title passed.

In *Leven v. Smith*,⁴⁰ the terms were cash on delivery; and the delivery being made, it was held that no title passed until payment was made or waived.

In *Hammett v. Linneman*,⁴¹ the property sold was coal and the terms were cash. The seller delivered the coal and then demanded payment, which was not made, and he thereupon brought replevin for the coal. It was found on these facts that payment was a condition precedent to the vesting of title in the purchaser, and a recovery was sustained, Leonard, Commissioner, observing that the judgment might also be sustained on the ground of fraud.

§ 339. In *Osborn v. Gantz*,⁴² a contract was made in writing for the sale of fifteen casks of cream of tartar, "payable by gold note at ninety days." The buyer objected to the quality of the goods when received, but refused to return them, or give the note, and replevin was brought. It was left to the jury to determine whether giving the

37. 21 Penna. 859. *Welsh v. Bell*, 32 Penna. 12.

38. 3 S. & R. 20. *Approved, Refining, &c., Co. v. Miller*, 7 Phil. 97.

39. 22 Wend. 659.

40. 1 Denio 571.

41. 48 N. Y. 399, 405.

42. 60 N. Y. 540.

note was a condition of the sale, and the jury holding that it was, their verdict was sustained.

In *Des Arts v. Leggett*,⁴³ it was held that the seller having tendered the property and demanded payment, could treat the property as that of the buyer and sue for the price; and there is a *dictum* by Comstock, J., questioning whether the seller can for default of payment consider the property his own. But it is now well established in New York that he can.

In *Mason v. Decker*,⁴⁴ the plaintiff tendered the property sold and demanded payment, which was refused. Earl, J., said: "In this state, in such a case, the seller has the election to consider the property his own, the buyer having forfeited his rights under the contract." *Russell v. Minor* and *Leven v. Smith* are also followed in the recent case of *Dows v. Kidder*,⁴⁵ where Danforth, J., said: "There was an agreement to sell, but payment was to be made in cash upon delivery. Payment was thus made a condition precedent, and until the condition was performed, the title could not be affected."

§ 340. In *Tyler v. Freeman*,⁴⁶ the agreement required payment by Massachusetts decisions. satisfactory note for four months, or three per cent. off for cash. The buyer elected to pay the cash and the goods were sent to him, but he did not pay, and the goods were seized by a creditor of the buyer. The seller claimed them by replevin. Metcalf, J., said: "The court are of opinion that the sale in this case was conditional, and that the condition was not waived by the delivery." This case might be explained on the theory that there was a fraudulent intent on the part of the buyer not to pay. But in *Whitney v. Eaton*,⁴⁷ a broker made a sale of indigo in the custom-house, to be paid for by the note of the buyer at six months. Before such payment was made, the buyer failed and made an assignment for the benefit of his creditors. The assignees having obtained possession of the goods, the seller brought replevin. Shaw, C. J., after premising that the assignees stood in the same position as the buyer, said: "It is stated explicitly in the agreed statement of facts, that the defendants, through their broker, agreed to pay for the indigo in their negotiable note at six months. * * * If such were the terms of sale,

43. 16 N. Y. 582.

45. 84 N. Y. 121, 127.

44. 72 N. Y. 595, 599; *Hayden v. Demeta*, 53 N. Y. 420, 431.

46. 3 Cush. 261.

47. 15 Gray 225.

then it was a conditional sale and delivery ; payment by note was a condition precedent, and until compliance with it the property did not pass."

§ 341. In *Adams v. O'Connor*,⁴⁸ whiskey at a freight depot was sold for cash, and the buyer went with the seller's agent to the depot, paid the freight and took possession of the whiskey, but did not pay the price. The owner brought trover, and the action was sustained on the authority of the three cases last above stated. Gray, J., said : "The sale to the defendants having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers until the terms of sale had been complied with."

In *Hirschorn v. Canney*,⁴⁹ cigars were sold in New York on the condition that if the buyer's references should be satisfactory, the cigars should be shipped to him, and he should send his notes in payment. Subsequently the sellers wrote that the references were satisfactory, inclosed a bill of lading, and requested the buyer to send his notes for the amount of the bill. The buyer received the cigars and sold them, but did not send his notes ; and the seller brought replevin against the innocent purchaser. This suit was sustained. Chapman, J., said : "The sale and delivery of the goods by the plaintiffs to Eaton were on condition that he should send his notes in payment. As he did not perform the condition, the title did not vest in him." To the same effect, see cases cited in the note. 50

§ 342. In *Stone v. Perry*,⁵¹ a merchant sold one hundred barrels of flour in Boston, and shipped them to the buyer in Maine, and sent him a bill marked "terms cash." Not being paid, the seller replevied the flour three days after the sale. Appleton, C. J., said : "The contract was made in Massachusetts, and the law of that place must govern. By that law, the sale being upon the condition of payment in cash upon delivery, no payment being made, the title of the vendor remains as between him and his vendee in the former. * * * To establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms, at the time of delivery. It is sufficient, if the intent of the parties can be inferred from their acts or the circumstances of the

48. 100 Mass. 515.

49. 98 Mass. 149.

50. *Farlow v. Ellis*, 15 Gray 229 ; *Armour v. Pecker*, 123 Mass. 143 ; *Salomon v. Hathaway*, 126 Mass. 482 ; *Kenney v.*

Ingalls, 126 Mass. 488 ; *Coggill v. Hartford, &c., R. R.*, 5 Gray 543 ; *Marston v. Baldwin*, 17 Mass. 606.

51. 60 Me. 48.

case." Cites *Hammett v. Linneman*.⁵² In *Seed v. Lord*,⁵³ wool was sold and sent to the buyer, to be paid for by his note at ninety days. The buyer not sending the note, the seller replevied. Danforth, J., said: "The legal effect of such a contract is, that the giving of the note is a condition precedent, and until that is done or waived, the title does not pass from the vendor." Cites the Massachusetts cases above stated.

§ 343. In *Wabash Elevator Co. v. Bank of Toledo*,⁵⁴ the owner of corn stored in a warehouse pledged the receipts to a bank; but having agreed to sell five thousand bushels, he procured from the bank receipts enough to satisfy the sale, agreeing to pay the price to the bank. The buyer took the receipts and undertook to make payment by giving the seller credit upon a debt which he owed to the buyer. The seller demanded cash, which was refused. Notice of all the facts was given to the elevator company, which delivered the grain to the buyer. The bank thereupon brought suit against the elevator company for the value of the corn. Day, J., said that the only question was whether the buyer obtained title. "The title did not pass. Under the circumstances disclosed in the evidence, there can be no doubt but that the transaction was understood by the parties as a cash sale. At all events, the proposition was made by one party and accepted by the other and no time of payment was mentioned. When this is the case, the sale is presumed to be for cash.

* * * A delivery, with the expectation of receiving immediate payment, is not absolute, but conditional, until payment is made; and, where there is no waiver of payment, no title vests in the purchaser till the price is paid." In *Hodgson v. Barrett*,⁵⁵ the buyer agreed to pay one-half in cash and one-half by his note for sixty days. He gave the note and a check for the money, and the property was delivered to him. The check was dishonored, and the court held, following the case last above stated, that the vendor could maintain replevin for the property.

§ 344. In *Goldsmith v. Bryant*,⁵⁶ a merchant sold and fitted in the buyer's house carpets, curtains, &c., receiving \$50 on account at the time the goods were ordered. The buyer not making payment when the work was finished, the seller replevied the

Wisconsin decisions.

52. *Ante* § 338.

53. 66 Me. 580.

54. 23 Ohio St. 311, 319.

55. 33 Ohio St. 63.

56. 26 Wis. 34, 38.

goods sold. The judge charged the jury "that if the goods were delivered without requiring the payment, the property passed to the buyer absolutely; but if payment was required at the time of delivery, and not made, the plaintiff would be entitled to a reasonable time within which to resume possession," and this charge was held correct on appeal. In *Fenelon v. Hogoboom*,⁵⁷ the buyer of wheat, stored in his own warehouse, received the receipts, and paid \$40 on account, at the same time proposing to meet the seller at the elevator soon after, where he refused to pay the balance, because of an attachment against the husband of the seller levied on the wheat. The seller brought trover for the value of the wheat. Lyon, J., said: "The evidence shows that a cash sale was contemplated and intended by the parties. Whatever title passed to defendant by virtue of the delivery, was divested by his refusal to pay for the wheat," and a recovery was sustained.

§ 345. In *Paul v. Reed*,⁵⁸ the buyer, moving into the seller's house, examined and selected a hog, some flour, butter, sugar and other articles, and agreed to take them at certain prices. He took out his pocket-book to pay for them, but at that moment the money due for the price was attached as a credit by a creditor of the seller, and the seller took back his goods. The court said that as the goods sold were, by law, exempt from attachment, the only question was whether the title to the goods vested in the buyer, so that he became indebted for them. Bellows, C. J., said: "The proof tends to show that the sale was for cash, and not on credit, and this is just what would have been intended had no time of payment been stipulated. The case, then, stands before us as a contract of sale for cash on delivery. In such case the delivery and payment are to be concurrent acts, and therefore if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer." Cites the New York cases of *Leven v. Smith* and *Russell v. Minor*, *supra*, and continues: "The general doctrine is fully recognized in this state in *Luey v. Bundy*,⁵⁹ and more especially in *Ferguson v. Clifford*,⁶⁰ where it is laid down that if the delivery

57. 31 Wis. 172, 176.

58. 52 N. H. 136.

59. 9 N. H. 298.

60. 37 N. H. 86.

takes place when payment is expected simultaneously therewith, it is, in law, made upon the condition that the price shall forthwith be paid. If this condition be not performed, the delivery is inoperative to pass the title to the property, and it may be instantly reclaimed by the vendor." The court said that placing the hog in another pen and mixing the sugar sold with some of the buyer's, did not show an intent to pass title without payment; and the buyer being willing to permit the contract to fall, the creditor took nothing.

§ 346. In *Pickett v. Cloud*,⁶¹ the contract was to deliver a specific lot of cotton at the buyer's gin-house, on a certain day, for a certain price. No express provision was made as to time of payment. The seller took the cotton to the place named at the proper time, and the buyer not being there to pay for it, took it away again. The buyer made a subsequent demand, and sued for damages for refusal to deliver the cotton. Johnson, J., said that the time of payment was on delivery. "Upon the whole matter, it appears to me that the plaintiff having failed to tender the money, and make demand of the cotton at the time and place stipulated in the agreement, the defendant had the right to elect either to enforce the contract against him, or to consider it at an end, and dispose of it on his own account." This was followed in *Neil v. Cheves*,⁶² where a part payment was made; but a new trial was ordered because the seller had not returned the part payment. These South Carolina cases were followed in a late case in California, *Beauchamp v. Archer*,⁶³ where cattle were separated from a herd under an agreement to sell, on which part payment had been made; the price was ascertained and a check tendered for it. The buyer refused the check, demanding cash, and turned the cattle back with the herd. A few days later the buyer tendered the price and demanded the cattle; the seller refused them and tendered back the part payment. The buyer brought suit for the cattle or their value. Ross, J., said that the number of cattle was not ascertained at the time of the first payment, and that payment gave the buyer no property in the cattle, "and the right of the seller to have the whole purchase money paid before they parted with the possession, left them at liberty to rescind upon the failure of the plaintiff to comply with his part of the agreement."

61. 1 Bailey 362, 366.

63. 58 Cal. 431.

62. 1 Bailey 537.

§ 347. In *Dannefelter v. Wright*,⁶⁴ Richardson, J., said: "If the defendant obtained possession of the buggy on consideration and on the promise that he would pay for it, and there was no agreement for credit, the plaintiff's right to retake it did not depend on the motives of the defendant at the time of the delivery, if the conditions were not afterwards complied with. For the purchaser, to whom property is delivered, coupled with the condition that he will pay for it, will be guilty of a fraud if he afterwards attempts to keep it without paying, although he intended to pay at the time he got it." So far as this decision is based on the idea of a right to rescind for fraud, it must be questioned, unless we are prepared to admit that every purchaser who keeps what he has not paid for is guilty of fraud. See *Thompson v. Wedge*,⁶⁵ stated *post* § 355. In *S. W. Freight, &c., Co. v. Stanard*,⁶⁶ Wagner, J., said: "There was nothing said between the parties as to payment; and where no time is stipulated for payment it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment; and if the payment be not immediately made, the contract becomes void."

§ 348. In *Mathews v. Cowan*⁶⁷ flour was sold and delivered, and the buyer after delivery gave a worthless check for it. An action of trover was brought. Sheldon, J., said: "In the case of a sale for cash, the payment of the price is a condition precedent implied in the contract of sale. As between buyer and seller the property never passed from the plaintiffs to the defendants, and the appropriation of the flour by the defendants to their own use was a conversion of the plaintiffs' property." *Hoffman v. Culver*⁶⁸ was a case of a sale for cash of a car-load of grain. The seller was to weigh it and pay for the number of bushels he might find, and it was put in his possession, and removed by him, when it was attached by his creditors. The seller not having been paid, replevied the goods. McAllister, P. J., said: "The payment of the price is a condition preliminary to the property passing to the buyer, and that could not be done before the property was ascertained by weighing." In *Michigan C. R. R. v. Phillips*⁶⁹ goods were sold for cash, and left with the buyer over night, to be paid for in the morning; but the buyer did

64. 27 Mo. 45, 47.

65. 50 Wis. 642, 644.

66. 44 Mo. 71, 83.

67. 59 Ill. 341, 347.

68. 7 Bradw. 450, 454.

69. 60 Ill. 190.

not pay for them, but pledged them to a bank. Sheldon, J., said: "No time being stipulated by the contract for payment of the price, its payment was a condition precedent implied by law, and the property would not vest in the vendee until he performed the condition or the seller waived it." But the court distinguished the case from *Mathews v. Cowan*, *supra*, because the property had come into the hands of a *bona fide* purchaser, whose rights were sustained. The rights of *bona fide* purchasers are discussed, *post* § 358, *et seq.* In *Allen v. Hartfield*⁷⁰ the sale was of horses, and \$20 was paid on account, and a day fixed for the payment of the residue. After the term of credit expired, the seller placed the horses in the stable of the buyer, and went to his house for payment, which the buyer offered in the seller's own notes. These the seller refused to receive, and the buyer refusing to give up the horses, the seller brought trover. Walker, C. J., said that no time being fixed for delivery of the horses, they were not to be delivered until the price was paid. "It may be that the title vested in the buyer, subject to be defeated by a non-compliance with his part of the agreement. But even if that be true he had no right to possession until he paid the money. If he obtained possession of the horses, without intending to pay for them in money, it was in violation of the contract, and in fraud of appellee's rights; and he then had a right to rescind the contract and sue for and recover the horses or their value."⁷¹

§ 349. In *Thompson v. Conover*⁷² the sale was of the seller's crop of corn, at a fixed price per bushel. After a portion was delivered, at the buyer's mill, it was levied upon by a creditor of the buyer, and the seller brought replevin. Green, C., delivering the opinion of the Court of Errors, said: "The vendor might have delivered all his crop on the same day, and demanded immediate payment, and upon its being refused, might have reclaimed the corn. But he chose to give credit for the purchase money till the entire crop was delivered, relying on the solvency and good faith of the vendee. He suffered the title to pass without the payment of the price, and has thus become a sufferer." This case is in harmony with the others above cited, except in this respect, that it seems to throw upon the seller the obligation of making his delivery, and demanding

70. 76 Ill. 358.

Toledo W. & W. R. R. v. Gilvin, 81 Ill.

71. See, also, *Van Duzor v. Allen*, 90 Ill. 511.

Ill. 499; *Bagley v. Findlay*, 82 Ill. 524; 72. 82 N. J. L. 466, 469.

payment simultaneously. Most of the cases hold that the seller may make delivery in installments, if the article is of a bulky character and such delivery is usual; and in default of payment when the last installment is delivered, he may reclaim the whole. See, *supra*, *Russell v. Minor*, *Henderson v. Lauck*, *Paul v. Reed*, and see *Harding v. Wirtz*.⁷³

§ 350. In *Riley v. Wheeler*,⁷⁴ Wheeler, J., said: "In Noy's Maxims it is said: 'If a man agree for the price of wares, he may not carry them away before he hath paid ^{Vermont decisions.} for them, if he have not day expressly given him to pay for them. But the merchant shall retain the wares until he be paid for them; and if the other take them, the merchant may have an action of trespass, or an action of debt for the money, at his choice.' We recognize this as sound law to the fullest extent." In *Phelps v. Hubbard*⁷⁵ the sale was of a specific lot of tobacco ready for delivery; a payment was made on account and part was taken by the buyer. The seller refused to deliver the residue until it was paid for, and after keeping it for about a year, resold it and brought an action for his loss. Dunton, J., said: "After keeping the tobacco a reasonable time for the defendant, and his refusal to take the same, the plaintiff had a right to sell it for the most he could get, and to call upon the defendant to pay him the difference between what he got for the tobacco and the contract price." In Alabama and Georgia there are statutes providing that on sales of cotton title shall remain in the seller until payment.⁷⁶

§ 351. The seller waives the condition of payment and the property passes, if he delivers it without requiring payment on delivery. In *Leedom v. Phillips*⁷⁷ the seller of a lot of sugar left it in front of the buyer's store in his absence. On the same day the buyer sold it, and two hours later failed. The seller replevied the goods. The court said: "If one sells goods for cash, and the vendee takes them away without payment of the money, the vendor should immediately reclaim them by pursuing the party." And it was held that by leaving the goods at

73. 1 Tenn. Ch. 610, 618.

74. 42 Vt. 528, 532.

75. 51 Vt. 489, 494. See *Jones v. Marsh*, 22 Vt. 144.

76. *Lehman v. Warren*, 58 Ala. 535;

Flanders v. Maynard, 58 Ga. 56. See, also, on the Georgia statute, the case of *Comer v. Cunningham*, 77 N. Y. 391, stated post §§ 358-360.

77. 1 Yeates 527.

the buyer's store without notifying any one there that the delivery was conditional, the seller had parted with title. *Leedom v. Phillips* is followed in *Bowen v. Burk*,⁷⁸ and *Rogers, J.*, said: "By an unqualified delivery, notwithstanding a cash sale, the seller relinquishes the advantage of his possession and trusts to his action on the contract." See *Backentoss v. Speicher*.⁷⁹ In *Mackanness v. Long*⁸⁰ the court said: "Although the terms of sale be cash, subsequent delivery without payment passes the property to the vendee, not only as against the rest of mankind, but against the vendor himself. If the vendee takes the goods away without payment, the vendor should immediately reclaim them by pursuing the party and retaking them, and this may be done, when necessary, even by force. The right of reclamation, after delivery, exists only in case of fraud or deceit in the purchase, or in procuring the possession." This, of course, means after an unconditional delivery.

§ 352. In *Smith v. Dennie*⁸¹ the sale was of ten boxes of sugar, to be paid for by notes with a certain endorser. The sugar was delivered and attached for the buyer's debts, after which the seller demanded the note, and, not receiving it, replevied the sugar. The jury found for the plaintiff, and the court, therefore, assumed that the sale was conditional, and considered the question whether the condition had been waived. *Parker, C. J.*, said: "We are of opinion that the verdict is against the evidence, for there was nothing in the case from which an intention to hold on, upon the condition, can be inferred; no declaration at the time, which, though not necessary, is important, and no call for security until it was forgotten or abandoned, and perhaps never would have been recurred to if the goods had not been attached." This case is approved in *Smith v. Lynes*.⁸² *Paige, J.*, said: "Where there is a condition precedent attached to a contract of sale and delivery, the contract does not vest in the vendee on delivery until he performs the condition, or the seller waives it. An absolute and unconditional delivery is regarded as a waiver of the condition." In *Husted v. Ingraham*⁸³ carpets for a hotel were delivered and fitted under an agreement that the buyer should pay for them by notes secured by a chattel mortgage. The seller did not demand the mortgage for more than a month after delivery. Mean-

78. 13 Penna. 146.

79. 81 Penna. 324.

80. 85 Penna. 158, 162.

81. 6 Pick. 262.

82. 5 N. Y. 41, 44.

83. 75 N. Y. 251.

time the property of the buyers was placed in the hands of a receiver, against whom the seller brought an action for conversion. Rapallo, J., said: "The omission to demand the mortgage simultaneously with the delivery of the property, or to make the delivery conditional upon the execution of the mortgage, and the subsequent delay in demanding the mortgage, were sufficient to preclude the plaintiffs from alleging that the delivery was conditional."

§ 353. The recent case of *Parker v. Baxter*⁸⁴ is instructive on this question. Corn was sold by a broker, and his note stated the terms—"payment cash." The seller delivered to the buyer, ship's receipts for the corn endorsed in blank, on his positive assurance of payment early on the next morning, the seller at first refusing to give up the receipts on account of the buyer's delay to pay on a previous sale. At the same time with the receipts the seller gave the buyer a bill, at the head of which was printed a notice that title did not pass until paid for; but to this the buyer's attention was not called. The buyer did not pay, but he pledged the goods to a banker, and the seller brought an action of replevin. The referee found that there was no fraud, and that title passed by the delivery of the receipts. On appeal the court considered simply the question whether title passed on the delivery of the receipts. Rapallo, J., citing *Smith v. Lynes* and *Osborn v. Gantz*, *supra*, § 339, said: "That where goods sold, to be paid for in cash or notes on delivery, are delivered to the purchaser without the cash or notes being given or demanded at the time, the presumption is that the condition is waived, and that a complete title vests in the purchaser, but that this presumption may be rebutted. The delivery of the shipping receipts to the buyer on his promise to pay on the next day, was presumptive evidence of an absolute delivery of the goods, and a giving of credit for the price, and if standing alone would have required the referee to find a complete delivery. The delivery, however, at the same time, of the bills containing the printed heading, was a circumstance to rebut that presumption, * * * but they do not seem to have been regarded by the parties as an element in the transaction, nor does it appear that they were even looked at. * * We do not feel at liberty to say that the intention of the parties was so conclusively proved that the referee could not pass upon it as a question of fact, and that there is no evidence in the case which can

⁸⁴. 86 N. Y. 586, 593. Compare with *stated post* § 357.
Copland v. Bosquet, 4 Wash. C. C. 588,

sustain his conclusion that the delivery was absolute." Many cases have been stated above, where on similar facts a different verdict was given, but the principle is the same, the question being usually one of fact for the jury.

§ 354. In *Warder v. Hoover*,⁸⁵ Adams, J., said: "Where the agreement is that goods are to be paid for in cash on delivery, and the goods are delivered, it appears to us that there is a sale, whether the payment is made or not."

In *Haskins v. Warren*,⁸⁶ the seller replevied cotton sold by him, because of non-payment of the price, and endeavored to prove a usage that title did not pass for ten days, during which the buyer held the goods for inspection. But the court held that the usage was not good, and Wells, J., said: "Payment of the price is the condition upon which alone the purchaser can require the seller to complete the sale by delivery of the property. But it is so, at the option of the seller. Delivery of possession, unqualified, is a release or waiver of his right, whether it be in the nature of a condition affecting the title, or only a lien for the price."⁸⁷ "An unconditional delivery of goods sold for cash is a waiver of any condition in the sale, and the seller cannot afterwards assert a title to the goods." Gray, C. J., in *Freeman v. Nichols*.⁸⁸ "It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs." Colt, J., in *Wigton v. Bowley*.⁸⁹

In *Cole v. Berry*,⁹⁰ Depue, J., said: "Payment of the contract price is one of the most usual conditions on which the transfer of title depends. It is generally a condition to be performed simultaneously with delivery. If such be the contract, a waiver of the condition may be presumed from an unconditional delivery without exacting payment, and in the absence of explanatory proof, the property will vest in the purchaser." Cites *Smith v. Dennie* and *Smith v. Lynes*, *supra*.

§ 355. *Thompson v. Wedge*,⁹¹ was a case where the buyer bought a cow at auction, terms cash or approved paper. The seller permitted the buyer to take the cow away on his promise to pay a few days later, but payment not being made the seller brought replevin. It was not sustained. Lyon, J., said: "The plaintiff waived the security re-

85. 51 Iowa 491, 493.

86. 115 Mass. 514, 533.

87. See *Morse v. Sherman*, 106 Mass. 430; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446, 452.

88. 116 Mass. 309.

89. 130 Mass. 252.

90. 42 N. J. L. 308, 310.

91. 50 Wis. 642.

quired by the terms of sale, by making the delivery without requiring it. Neither is there any ground for claiming that the defendant obtained delivery of the property by fraud. Thus we have here the simple case of a sale of property on credit, and an absolute delivery thereof to the purchaser."

In *McCraw v. Gilmer*,⁹² a cow was sent to a lawyer as an advance payment for legal services, but the lawyer died before he rendered the services, and the client replevied the cow. But the court held that the transfer was clearly unconditional.⁹³

§ 356. If credit is given this is a waiver of the condition of payment, and the contract of sale passes both property and right of possession. "If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him." Clifford, J., in *Leonard v. Davis*.⁹⁴

This principle is subject only to this modification, that if the buyer becomes insolvent before he receives the goods, the seller may retain them under his lien, or by the exercise of the right of stoppage *in transitu*. See *Milliken v. Warren*; ⁹⁵ and see *post* Book V., Part I., Chap. V.

§ 357. Although the seller delivers goods without requiring payment, he may reserve title by an express stipulation to that effect. Such a delivery is called a *conditional delivery*, and is sometimes distinguished from a conditional sale. In *Copland v. Bosquet*,⁹⁶ (stated *ante* § 336,) Washington, J., said: "Though the sale was conditional, still it was competent to the vendor to dispense with that condition; and if the subsequent delivery of the wine was unconditional, that circumstance is evidence of such dispensation, and that the vendor looked not to the wine, but to the personal security of the vendee. It becomes necessary, therefore, to inquire whether the *delivery* to vendee's agent was absolute or conditional. Upon the agent's first application for

Waiver by giving credit.

Express reservation of title, on delivery.

92. 83 N. C. 162.
93. See further on this subject *Wilmarth v. Mountford*, 4 Wash. C. C. 79, 83; *D'Wolf v. Babbett*, 4 Mason 289; *Rose v. Story*, 1 Penna. St. 190; *Landry v. Thomas*, 3 Phil. 300; *Flanders v. Maynard*, 58 Ga. 56; *McNail v. Ziegler*, 68 Ill. 224.

94. 1 Black 476, 483. See *Thompson*

v. Wedge, 50 Wis. 642; *McCraw v. Gilmer*, 83 N. C. 162; *Johnson v. Farnum*, 56 Ga. 144; *McNail v. Ziegler*, 68 Ill. 224. See, also, *Bloxham v. Sanders*, 4 B. & C. 941, stated by our author, *post*, in the chapter on "Delivery."

95. 57 Me. 46.

96. 4 Wash. C. C. 588, 593.

delivery it was refused, and he was told that it would be first necessary to be satisfied of the goodness of the paper. Becoming impatient the agent again applied for the wine, when it was delivered, *express'y on condition* that he should cause to be produced a satisfactory acceptance, or cash, agreeably to the terms of sale. Here, then, was a delivery to the agent upon his promise, which in the view of the law was the promise of his principal, to fulfill the terms of the contract, as the express condition of the delivery." A replevin by the plaintiff, who had succeeded to the rights of the seller, was sustained.⁹⁷ Other cases illustrating this principle are above stated in § 338, *et seq.* Sales on condition of payment are discussed in the next chapter.

§ 358. The American decisions are not harmonious as to the rights of a *bona fide* purchaser from a buyer in possession under a conditional delivery. In New York a distinction is made between purchasers from one who holds property under a conditional *sale*, and purchasers from one who holds under a conditional *delivery*. It is settled in that state that where the *sale* is on the condition of payment the buyer cannot transfer good title, except in certain exceptional cases. See next chapter. But a *bona fide* purchaser, for value, without notice, from one who has come into possession under an unconditional sale, but under a conditional delivery, obtains valid title. The question is fully discussed in *Comer v. Cunningham*,⁹⁸ and the previous decisions in the same court are explained, and an effort is made to reconcile them by the above distinction. The suit was an action of replevin by the owners of cotton in Georgia, who sold it to one Williams, receiving two checks in payment, one of which was dishonored. Williams shipped the cotton to the defendants, who accepted his draft against it and received the cotton. The original sellers brought replevin, and proved a Georgia statute that cotton sold by a cash sale shall not be considered the property of the buyer until fully paid for, though it be delivered to him. Rapallo, J., said that the sale was an absolute sale, and the statute "simply made the *delivery* conditional, and if written into the contract would affect nothing but the delivery. * * * When goods are sold to be paid for in cash or by notes on delivery, if delivery is made without demand of the notes or cash, the presumption is that the condition is waived, and a complete title vests in the purchaser; but this presumption may be rebutted by proof of acts or declarations

Rights of a
bona fide pur-
chaser.

New York
rule.

97. Cites *Harris v. Smith*, 3 S. & R. 20; *Hussey v. Thornton*, 4 Mass. 405. 98. 77 N. Y. 391.

and circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery, although as between the parties to the sale such delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title. * * * *Rawls v. Deshler*, 3 Keyes 572, is very much in point. Deshler sold a quantity of corn to Griffin, and gave him an order on the elevator to deliver the corn to him, 'subject to my order till paid for.' This delivery was clearly conditional. Yet this court held that Griffin having shipped the corn and drawn against it, the drawees, having paid the draft on the faith of the bill of lading, were protected as *bona fide* purchasers, and also under the factor's act."

§ 359. Judge Rapallo also cited in support of this decision *Smith v. Lynes*, *Fleeman v. McKean*, *Beavers v. Lane* and *Wait v. Green*, and distinguished *Ballard v. Burgett* and *Austin v. Dye*, as cases of conditional sale, and *Herring v. Hoppock* and *Strong v. Taylor*, as cases where the rights of *bona fide* purchasers were not in question.⁹⁹ The case of *Ballard v. Burgett* is stated to support *Comer v. Cunningham*, because it makes the answer to the inquiry in whom is the risk of loss of the property, the test to determine in whom is the title. In *Wait v. Green*,⁹⁹ a note was given for the price of a horse delivered. At the foot of the note was a memorandum that the note was given for a horse, and that the seller retained title till the note was paid. The court held that a *bona fide* purchaser from the buyer obtained good title. This case is explained in *Ballard v. Burgett* as a case where the risk of loss was in the buyer, the note being obligatory though the horse should die, showing that the condition was a mere security for the price. *Comer v. Cunningham* is approved in *Dows v. Kidder*.¹⁰⁰

§ 360. The distinction between conditional sales and conditional deliveries is not clearly defined, and the New York rule, as promulgated in *Comer v. Cunningham*, seems likely to ^{New York rule criticised.} add to the confusion already existing in this branch of the law. Where parties have agreed upon an unconditional sale, it is quite competent for them at the time of delivery to change the transaction into a conditional sale. If they do so, it is forcing upon them a contract which

99. *Smith v. Lynes*, 5 N. Y. 41; *Fleeman v. McKean*, 25 Barb. 474; *Beavers v. Lane*, 6 Duer 238; *Wait v. Green*, 36 N. Y. 556; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Herring v. Hoppock*, 15 N. Y. 409; *Strong v. Taylor*, 2 Hill 328.
100. 84 N. Y. 121, 128

they have annulled, to insist upon the original contract in determining their rights.

The rule *nemo dat quod non habet* applies with as much force to a conditional delivery as to a conditional sale. No reason is given in *Comer v. Cunningham* why the title of a purchaser should be better in the one case than in the other, except that the distinction reconciles the decisions in the New York Court of Appeals. It is very doubtful whether even this advantage has been gained. *Wait v. Green*, above stated, seems to be as clearly a conditional sale as *Ballard v. Burgett*, or *Austin v. Dye*, *supra*.

§ 361. *Brundage v. Camp* 101 is the leading case in Illinois. That was a case of a sale on condition of giving a note, and permission was given to the buyer to take the property on condition that the note should be given by the following Monday. A sale by the buyer was sustained in favor of a *bona fide* purchaser, though the note was not given. This decision was followed in *Michigan C. R. R. Co. v. Phillips*, *Young v. Bradley* and *Van Duzer v. Allen*, 102 and in the last-named case it is held that a creditor and a purchaser stand on the same footing. These Illinois cases were decided on the ground that the first vendor should suffer, because he has put it in the power of his vendee to defraud others by entrusting him with the appearance of ownership; and no distinction seems to be made between conditional sales and conditional deliveries, though the cases above cited might all be regarded as conditional deliveries. In Pennsylvania the rule is well settled that an agreement to retain title, either on a conditional sale or conditional delivery, is void as regards creditors of, or *bona fide* purchasers from, the buyer in possession. 103

§ 362. In Massachusetts a purchaser of property, delivered on condition that no title shall pass until payment is made, obtains no title. No distinction is taken between conditional sales and conditional deliveries. See *Adams v. O'Connor*, and *Hirschorn v. Canney*, stated *ante* § 341. In this last case the court rejects the New York rule as declared in *Smith v. Lynes*. 104

101. 21 Ill. 830.

102. *Michigan C. R. R. v. Phillips*, 60 Ill. 190, 194; *Young v. Bradley*, 68 Ill. 553; *Van Duzer v. Allen*, 90 Ill. 499, 502.

103. *Martin v. Mathiot*, 14 S. & R. 214; *Rose v. Story*, 1 Penna. St. 190; *Haak v.*

Linderman, 64 Penna. 499; *Stadtfeld v. Huntsman*, 92 Penna. 53.

104. See, also, *Coggill v. Hartford & N. H. R. R.*, 3 Gray 545; *Deshon v. Bigelow*, 8 Gray 159.

In Illinois and Pennsylvania *bona fide* purchasers protected.

In most of the states the purchaser gets only his vendor's title.

These Massachusetts cases are cited and followed in *Cole v. Berry* and in *Bradshaw v. Warner*.¹⁰⁵ Both of these two last-named cases were in form conditional sales; but notes were given, so that they do not differ from the New York case of *Wait v. Green*, the obligation to pay existing, though the chattels sold should be destroyed. The Massachusetts decisions have been generally followed, and in most of the states a *bona fide* purchaser gets no better title than his vendor. See next chapter.

§ 363. It is apparent that where the seller accepts an unconditional obligation or promise for the price of goods delivered to the buyer, coupled with an agreement that title shall be vested in the seller until payment, such an agreement may be appropriately considered a mortgage to secure the price. See *ante* pp. 8 and 9. This view was suggested by Comstock, J., in *Herring v. Hoppock*.¹⁰⁶

Effect of the
chattel mort-
gage acts.

On this theory a *bona fide* purchaser from the buyer, may logically be held to obtain title against the seller, under the chattel mortgage acts, if the seller omits to file his agreement as a chattel mortgage. This is the reasoning of the United States Supreme Court. See *Hervey v. R. I. Locomotive Works*,¹⁰⁷ *Heryford v. Davis*.¹⁰⁸ The principle of these two last-named cases applies wherever the buyer is under a personal obligation to pay the price which the title is reserved to secure; and it is not material whether the agreement to reserve title arises on the sale or on the delivery. This subject is further considered in the next chapter.

105. *Cole v. Berry*, 42 N. J. L. 308, 314; 107. 93 U. S. 664.
Bradshaw v. Warner, 54 Ind. 58, 62. 108. 102 U. S. 235.
106. 15 N. Y. 409, 414.

CHAPTER III.

SALE OF SPECIFIC CHATTELS CONDITIONALLY.

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§ 364. Two rules on this subject are stated by Lord Blackburn, (a) as follows:

First.—Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.¹

Two rules on this subject given by Lord Blackburn.

Where vendor is to do anything to goods before delivery, property does not pass

§ 365. *Secondly.*—Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.²

Where goods are to be tested, weighed, or measured, property does not pass.

§ 366. *Third Rule.*—To these may be added, *Thirdly*—Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.³

Where buyer bound to a condition, property does not pass, even by actual delivery, till performance of condition.

The authorities in support of these propositions will now be considered.

(a) On Sale, pp. 151–2.

1. See post § 400, *et seq.*, for American decisions.

2. See post § 414, *et seq.*, for American decisions.

3. See post § 425, *et seq.*, for American decisions.

§ 367 In *Hanson v. Meyer*, (b) the defendant sold a parcel of starch, at £6 per cwt., and directed the warehouseman to weigh and deliver it. Part was weighed and delivered, and then the purchaser became bankrupt, whereupon the vendor countermanded the order for delivery of the remainder, and took it away. In an action for trover, brought by the assignees of the bankrupt purchaser, Lord Ellenborough said, that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because "the price is made to depend upon the weight." 4

§ 368. In *Rugg v. Minett*, (c) a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the vendors, out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but a few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The court held, that the property had passed in those lots only which had been filled up, because, as Lord Ellenborough said: "Everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bayley, J., said, that it was incumbent on the buyer "to make out that something remained to be done to the goods by the sellers at the time when the loss happened." 5

§ 369. In *Zagury v. Furnell*, (d) the property was held not to have passed, in a sale of "289 bales of goat skins, from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57s. 6d. per doz.," because, by the usage of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, and this had not been done when the goods were destroyed by fire. This was a decision of

(b) 6 East 614.

4. See *Hoffman v. Culver*, 7 Bradw. 450, 454; *Elgee Cotton Cases*, 22 Wall. 189.

(c) 11 East 210.

5. *Rugg v. Minett* was followed in *Foster v. Ropes*, 111 Mass. 10, 15.

(d) 2 Camp. 240.

Lord Ellenborough, at *Nisi Prius*, and the reporter states that after the plaintiff's nonsuit, he brought another action in the Common Pleas, and was again nonsuited by Sir James Mansfield, C. J., who concurred in opinion with Lord Ellenborough.

In *Simmons v. Swift*, (e) the sale was of a specified stack of bark, at £9 5s. per ton, and a part was weighed and taken away, and paid for. Bayley, J., and the majority of the court, held, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary."

§ 370. In *Logan v. Le Mesurier*, (f) the sale was on the 3d of December, 1834, of a quantity of red-pine timber, then lying above the rapids, Ottawa river, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes at ninety days from the date of sale, at the rate of 9½d. per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at 9½d., and if it fell short, the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet, before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive, the raft was broken up by a storm, and a great part of the timber lost, before it was measured and delivered. Held, that the property was not transferred until measured, and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

§ 371. In *Gilmour v. Supple*, (g) where the facts were identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were, "Sold Allan, Gilmour, and Co., a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole 7½d. per foot." The raft *was delivered* to the buyers' servant, at the appointed place,

(e) 5 B. & C. 857.

4 Taunt. 644; *Shepley v. Davis*, 5 Taunt.

(f) 6 Moo. P. C. 116. See, also, *Wal-* 617; *Withers v. Lyss*, 4 Camp. 237; *Bo-*
lace v. Breeds, 18 East 522; *Busk v.* well v. Kilborn, 15 Moo. P. C. 309.
Davis, 2 M. & S. 397; *Austen v. Craven*, (g) 11 Moo. P. C. 551.

and broken up by a storm the same night. The court held, in this case, that the property had passed, because it was proven that the raft *had been measured before delivery*, by a public officer, and it was not to be measured again by the vendor. The buyer was at liberty

Goods measured for buyer's satisfaction only.

Swanwick v. Sothorn.

chaser. 6

§ 372. In *Acraman v. Morris*, (i) the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions that he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own expense, conveying them from Monmouth to Chepstow. The timber in controversy had been bought, measured, and paid for, but the rejected portions had not yet been severed by Swift, when he became bankrupt, and the felled trees then lay on his premises. Defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover, by the assignees of the bankrupt. Held, that the property had not passed to the buyer, Wilde, C. J., saying, that "several things remained to be done by the seller * * * it was his duty to sever the selected parts from the rest, and convey them to Chepstow, and deliver them at the purchaser's wharf."

§ 373. But in *Tansley v. Turner*, (k) the sale by the plaintiff was as follows:—"1833. Dec. 26. Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, says 1s. 7½d. Payment on or before 29 Sept. 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled;" and some trees were measured and taken away the same day. The remaining trees were

(h) 9 Ad. & E. 895.

6. Floating Timber.—There are many cases of sales of logs and floating timber in the American reports. See *Wilkinson v. Holiday*, stated § 405, *post*; *Pike v. Vaughn*, 39 Wis. 499; *Riddle v. Varnum*, stated § 420 *post*; *Scott v. Wells*, stated § 420, *post*; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *Leonard v. Black*, stated *post* §

422; *Cushman v. Holyoke*, 34 Me. 239, stated *post* § 397; *Bethel Steam Mill Co. v. Brown*, *post* § 421; *Martin v. Hurlbut*, 9 Minn. 142, stated *post* § 424; *Adams Mining Co. v. Senter*, 26 Mich. 73, stated *post* § 422.

(i) 8 C. B. 449.

(k) 2 Scott 238; 2 Bing. N. C. 151.

marked and measured some time afterwards, and the number of cubic feet in the several trees was taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement and send it to Jenkins. This was not done, but it was held that the property had passed, nothing remaining to be done by the vendor to the thing sold.

Cooper v. Bill (l) was very similar to the above case in the facts, and was decided in the same way, Tausley v. Turner, however, not being cited by the counsel or the court. ⁷ Cooper v. Bill.

§ 374. In Castle v. Playford, (m) the contract was for the sale of a cargo of ice to be shipped, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever, and the said Playford to buy and receive the said ice on its arrival at ordered port * * * and to pay for the same in cash on delivery at 20s. per ton, weighed on board during delivery." Declaration for the price by the vendor, and plea that the cargo did not arrive at the ordered port, and the plaintiffs were not willing and ready to deliver. On demurrers to the declaration and the plea, Martin and Channell, BB., were of opinion (Cleasby, B. diss.) that the property did not pass by the terms of the contract, that the time for payment had not arrived, and that the defendant was not liable: but in the Exchequer Chamber the judgment was unanimous for the plaintiff, Cockburn, C. J., and Blackburn, J., expressing a very decided opinion that the property passed by the agreement, but the case was not decided on that point, but on the ground that whether the property passed or not, the defendant undertook to pay for it if delivery was prevented by dangers of the sea; and that in cases where property is to be paid for on delivery, and where the risk of delivery is assumed by the purchaser, if the destruction of the property prevents the delivery, the payment is still due, as decided in the cases below cited. (n)

Castle v. Playford.

Where buyer assumes risk of delivery, price must be paid, even if property does not pass, if goods destroyed before delivery.

§ 375. Similar questions were involved in Martineau v. Kitching, (o) where sugars were sold by the manufacturer to a broker. The terms were, "Prompt at one month; goods Martineau v. Kitching

(l) 34 L. J., Ex. 161; 3 H. & C. 722.

7. Brewster v. Leith, 1 Minn. 56.

(m) L. R., 5 Ex. 165; 7 Ex. 98.

(n) Alexander v. Gardner, 1 Bing. N. C. 671; Fragano v. Long, 4 B. & C. 219.

(o) L. R., 7 Q. B. 436.

at seller's risk for two months." The goods had been marked, and paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitively adjusted and settled when the goods came to be weighed on delivery; and part of them had been taken away by the purchaser. The residue was destroyed by fire after the lapse of the two months, and before being weighed. Held by Cockburn, C. J., that the property had passed to the purchaser; and the other members of the court seemed to agree with him, but the case was decided on the same ground as that of *Castle v. Playford*, *supra*.⁸

[But in such cases the intention that the purchaser shall assume the risk before the property in the goods has vested in him must be either expressed in the written contract between the parties, as in *Castle v. Playford* and *Martineau v. Kitching*, or clearly to be inferred from the circumstances of the case, the presumption being that the risk and the property go together.

§ 376. Thus, in *Anderson v. Morice*, (p) the plaintiff sought to recover the value of a cargo of rice which he had insured with the defendant, an underwriter at Lloyd's. The plaintiff had bought the rice under a contract, the material parts of which were as follows: "Bought *the cargo* of Rangoon rice, per Sunbeam, at 9s. 1½d. per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight, *with documents attached*." The sellers advised the plaintiff to effect an insurance on the rice, per Sunbeam, and the plaintiff accordingly effected a policy of insurance with the defendant, which described the adventure as: "Beginning upon the goods and merchandises from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon." The Sunbeam arrived at Rangoon, and had taken on board 8878 bags of rice, the remaining 400 bags, which would have completed her cargo, being in lighters alongside, when she sank and was lost with the cargo on board of her. The captain afterwards signed bills of lading for the cargo shipped, which were endorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff. It was held in the Exchequer Chamber (diss. Quain, J.,) and afterwards affirmed by the House of

8. *Martineau v. Kitching* was followed (p) 1 App. Cas. 713, in Ex. Ch., L. R., in the *Elgee Cotton Cases*, 22 Wall. 180, 10 C. P. 609; S. C., Id. 58. 183, stated *post* § 400.

But the intention of the parties must be clearly indicated.

Lords, (the Lords being, however, equally divided,) reversing an unanimous decision of the Common Pleas :—

1st, that by the terms of the contract of sale, the property in the rice did not vest in the plaintiff until a full cargo was shipped. The first rule laid down by Lord Blackburn, cited *ante* § 364, was referred to with approval, and it was held that the completion of the loading, so that shipping documents could be made out, was a thing to be done by the vendor for the purpose of putting the goods into a deliverable state.

2ndly, that there was no sufficient intention manifested by the fact of insurance and the terms of the policy, that the purchaser should assume the risk of loss before the property had vested in him, and that, therefore, he had no insurable interest in the goods at the time when they were lost.

Upon this 2nd point the reader is referred to the observations of Blackburn, J., L. R., 10 C. P. at p. 619.]

§ 377. A statement is made by the learned editors of Smith's Leading Cases, Vol. I., p. 164, (ed. 1879,) that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported,) that the property in a specified chattel bought in a shop to be paid for upon being sent home did not pass before delivery;" and in accordance with this is the *dictum* of Cockburn, C. J., in the *Calcutta Company v. De Mattos*, (q) that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that *the thing sold was to be in the meantime at the risk of the buyer*, the contract is not fulfilled by the seller unless he delivers it accordingly." 9

Goods sold to be paid for on delivery at a particular place.

In both these instances, as in *Acraman v. Morris*, (r) something remained to be done by the seller to the thing sold, in order to make the agreement an executed contract.

In *Langton v. Higgins*, (s) it was held that where the buyer had purchased in advance *all* the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him.

Langton v. Higgins.

Goods put in buyer's packages.

(q) 32 L. J., Q. B. 322, 355.
9. See *ante* §§ 325-329.

(r) 8 C. B. 449; 19 L. J., C. P. 57.
(s) 28 L. J., Ex. 252; 4 H. & N. 402.

§ 378. But the property in goods will pass, even though something remain to be done by the vendor in relation to the goods sold, *after their delivery to the vendee*.¹⁰ Thus, where, by the custom of the trade, if the goods sold continued to lie at the wharf after the sale, the vendor was bound to pay for the warehousing during fourteen days—*held*, that this did not prevent the property from passing from the moment of the delivery. (t) And the same point was held in *Greaves v. Hepke*, (u) where, by the usage at Liverpool, the vendor was bound to pay warehouse rent for two months after the sale, and the goods were distrained during that interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser.

The decision would no doubt be the same in other familiar cases, as if a vendor should engage to keep in good order for a certain time after the sale a watch or clock sold; or to do certain repairs to a ship after the sale and delivery.

§ 379. In *Turley v. Bates*, (x) (also reported *sub nom.* *Furley v. Bates*), (y) the jury found that the bargain between the parties was for an entire heap of fire-clay, at 2s. per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not by the seller, but by the buyer*. Without determining this point, the conclusion was drawn that from the terms of the contract, as established by the verdict of the jury, the intention of the parties was that the property should pass, and this was what the court must look to in every case. (z)¹¹

§ 380. In *Kershaw v. Ogden*, (a) the facts, as found by the jury,

10. See *Mount Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Goddard v. Binney*, 115 Mass. 450. See, also, *ante* §§ 329–333; and see *post* §§ 418–424. See, *contra*, *Pritchett v. Jones*, 4 Rawle 260, 266, stated in § 402, *post*.

(t) *Hammond v. Anderson*, 1 B. & P. N. R. 69.

(u) 2 B. & Ald. 131.

(x) 2 H. & C. 200.

(y) 33 L. J., Ex. 43.

(s) *Logan v. Le Mesurier*, 6 Moo. P. C. 116, and *Hinde v. Whitehouse*, 7 East 558.

11. *Sedgwick v. Cottingham*, 54 Iowa 512, stated *post* § 423; *Burrows v. Whitaker*, 71 N. Y. 291, stated *post* § 424.

(a) 34 L. J., Ex. 159, and 3 H. & C. 717.

Where something is to be done to the goods by vendor after delivery.

Turley v. Bates.

Where something is to be done to the goods by the buyer.

were that the defendants purchased four specific stacks of cotton waste at 1s. 9d. per lb., the defendants to send ^{Kershaw v. Ogden.} their own packer and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the eighty-one sacks. Two days afterwards twenty-one of the sacks were weighed and taken to defendants' premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the quality. The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent its spoiling. *Held*, in an action on counts for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiff was entitled to recover, Pollock, C. B., saying the case was not distinguishable in principle from *Furley v. Bates*, and *Martin, B.*, saying that on the finding "the property in the four stacks *became the property of the buyers*, and the plaintiff became entitled to the price in an action for *goods bargained and sold*." This *dictum* was not necessary to the decision, because there was a special count for non-accepting, under which the recovery could be supported, even if the contract was executory. The *dicta* of the two learned Barons in this case may, perhaps, be reconciled with the decision in *Simmons v. Swift*, (b) on the ground that the purchasers, by their return of the sacks weighed, and refusal to take any, had waived the condition that the remainder should be weighed by the vendor.

§ 381. In *Young v. Matthews*, (c) a purchaser of 1,300,000 bricks sent his agent to the vendor's brick-field to take delivery, and the vendor's foreman said that the bricks were under ^{Young v. Matthews.} distraint for rent, but if the man in possession were paid out, he would be ready to deliver the bricks; and he pointed out three clumps *from which* he should make the delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded, but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; the court, however, laying stress on some other circumstances to show that this was the intention of the parties. This case is only reconcilable with the authorities on the

(b) 5 B. & C. 857, *ante*, § 369.

(c) L. R., 2 C. P. 127.

ground that as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule.

§ 382. Another class of cases illustrative of the rules now under consideration, are those in which the subject of the contract is an unfinished or incomplete thing, a chattel not in a deliverable state, as a partly-built carriage or ship. Leaving out of view the cases (*d*) where no specific chattel has been appropriated (to be considered *post*, Ch. V), it will be found that the courts have held it necessary to show an express intention in the parties that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule that governs where goods are not in a deliverable state.¹²

§ 383. In the case of *Woods v. Russell*, (*e*) decided in 1822, the ship-builder had contracted with defendant to build a ship for him and to complete her in April, 1819; the defendant was to pay for her by four installments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched; the ship was measured *with the builder's privity*, while yet unfinished, *in order that defendant might get her registered in his name*; the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third installment. On the 30th the builder committed an act of bankruptcy, and on the 2d of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the ship-builder's privity*, for a voyage. An action in trover was brought by the assignees of the bankrupt, and it was held that the property had passed, "because the ship-builder signed the certificate to enable the defendant to have the ship registered in the defendant's name, and by that act consented, as it seems to us, that the general property in the ship should be considered *from that time* as being in the defendant." It is thus clearly intimated, that in the absence of some special evidence of intention, the property would have remained in the builder.

(*d*) *Mucklow v. Mangles*, 1 Taunt. 218; *Bishop v. Crawshay*, 3 B. & C. 418; *Atkinson v. Bell*, 8 B. & C. 277. 12. See *post* §§ 398, 399, and §§ 408-413. (*e*) 5 B. & Ald. 942.

§ 384. In *Clarke v. Spence*, (f) the defendants were the assignees of a bankrupt ship-builder named Brunton. In February, 1832, Brunton had agreed to build a ship (not the one in ^{Clarke v. Spence.} question in the action) for the plaintiff, according to certain specifications, under the superintendence of an agent appointed by plaintiff, for £3250 payable as follows: £400 when the ship was rammed, £400 when timbered, £400 when decked, £500 when launched, the residue, £1500, half at four and half at six months. In July he agreed to build another vessel, of specified dimensions, for £3400, to be finished like the previous ship, and "the vessel to be launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Howard (plaintiff's agent) to superintend the building and to be paid £40 for the same." Brunton proceeded to build the vessel, and before his bankruptcy she was rammed and timbered, and two installments paid accordingly. £200 were also paid by anticipation on account of the third installment. When Brunton became bankrupt, £1002 11s. had been paid him on account, and the frame of the vessel was then worth £1601 13s. 7d., that being the value of the timber and work done on her. The case was elaborately argued in November, 1835, and held under advisement till the ensuing February, when Williams, J., delivered the judgment. Much stress had been laid, in argument, on a passage in the opinion delivered by Bayley, J., in *Atkinson v. Bell*, (g) in which he said that "the foundation of the decision in *Woods v. Russell* (h) was, that as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, *the ship was irrevocably appropriated to the person paying the money*; that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams, J., showed that in *Woods v. Russell* (h) the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful. * * * Until the last of the necessary materials be added, the vessel is not complete;

(f) 4 Ad. & E. 448. See, also, *Read v. Fairbanks*, 13 C. B. 692; 22 L. J., C. P. 206. (g) 8 B. & C. 277, 282. (h) 5 B. & Ald. 942.

the thing contracted for is not in existence; for the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods v. Russell*."

The court, however, held that the passage cited from *Woods v. Russell*, was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and *is equivalent to an express provision that on payment of the first installment, the general property in so much of the vessel as is then constructed shall vest in the purchaser.*"

The court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this *dictum* from *Woods v. Russell*, as a *rule of construction* by which, in similar ship-building contracts, the parties are held to have, by implication, evinced *an intention that the property shall pass*, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time. (i) ¹³

§ 385. The next case was *Laidler v. Burlinson*, (k) in the Exchequer, in 1837, in which the court recognized the authority of *Woods v. Russell* and *Clarke v. Spence*, but held those cases not applicable to the contract before it. A ship-builder having a vessel in his yard about one-third completed, a paper was drawn up describing her build and materials, ending with the words, "for the sum of £1750, and payment as follows, opposite to each respective name." This was signed by James Laing, the ship-builder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing simply, "Thomas Laidler, one-fourth." The whole number of shares was not made up till after the ship-builder had committed an act of bankruptcy. The plaintiff proved some payments

Where contract for building a ship provides for payment by installments.

Laidler v. Burlinson.

(i) See per Mellish, L. J., in *Ex parte Lambton*, 10 Ch. 405, 414.

13. See post §§ 399, and 408-412.
(k) 2 M. & W. 602.

made on account, and the ship-builder became a bankrupt while the vessel was still unfinished. *Held*, that there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in *Woods v. Russell* or *Clarke v. Spence*. I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The court held that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first installment vested the property in the purchasers. Suppose the builder had died after the first installment was paid, the ship in its then state would have become the property of the purchaser, and not of the executor. A party may agree to purchase a ship when finished, or as she stands." Parke, B., said: "If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (*Langfort v. Tiler*, 1 Salk. 113.) But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. * * * Is this a contract for an article to be finished? In that case, the article must be finished before the property vests."

§ 386. In *Wood v. Bell*,⁽¹⁾ in 1856, the plaintiff contracted with Joyce, a ship-builder, for a steamer to be built by the latter for £16,000. The contract was in March, 1854, ^{*Wood v. Bell.*} and the price was payable, £4000, in four equal parts, on days named in March, April, May, and June; £3000 on the 10th August, 1854, "providing the vessel is plated and decks laid;" £3000 on the 10th October, "providing the vessel is ready for trial;" £3000 on the 10th January, 1855, "providing the vessel is according to contract, and properly completed;" and £3000 on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame, not decked, and about two-thirds plated. The installments contracted for were paid by the plaintiff, in advance. The plaintiff had a superintendent, who supervised the building, objected to materials, and ordered alterations, which

(1) 5 E. & B. 772, and 25 L. J., Q. B. and 25 L. J., Q. B. 321. 148, and S. C., in Ex. Ch., 6 E. & B. 355,

were submitted to by Joyce. In July, the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the plaintiff's name was, at his own instance, punched on a plate riveted to the keel of the ship. It also appeared that in November the plaintiff urged Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of everything he possessed;" but during the discussion he admitted that the ship was the property of the plaintiff. On these facts, the Court of Queen's Bench, and the Exchequer Chamber, on writ of error, held that the property in the vessel had passed to the plaintiff, Lord Campbell saying, when giving the judgment of the court, that the terms which made the payments dependent on the vessel's being built to certain specific stages on the days appointed, were "as an indication of intention, substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." The case was determined mainly on the authority of *Woods v. Russell*, (m) and *Clarke v. Spence*. (n)

§ 387. [The rule of construction laid down in *Clarke v. Spence* (o) does not however apply where the contract is for work and materials to be supplied to a ship by way of repairs and alterations, although the contract provides for payment by installments "as the work progresses," and upon the certificate of an inspector employed by the ship-owner.

Same rule does not apply in a contract for work and materials to be supplied.

Thus in the *Anglo-Egyptian Navigation Co. v. Rennie* (p) in 1875, the defendants, a firm of engineers, had contracted to make and supply new boilers and machinery for a steamship belonging to the plaintiff company, and to make alterations in the engines of the steamship according to a specification. The engines and boilers, and connections, were to be completed in every way ready for sea, so far as specified, and tried under steam by the defendants before being handed over to the company, the result of the trial to be to the satisfaction of the company's inspector. *The price was to be paid by the company by installments as the work progressed in*

Anglo-Egyptian Navigation Co. v. Rennie.

(m) 5 B. & Ald. 942; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R., 10 C. P. 271.

(n) 4 Ad. & E. 468.

(o) 4 Ad. & E. 448, *ante* § 384.

(p) L. R., 10 C. P. 271.

the following manner, viz., £2000 when the boilers were plated, £2000 when the whole of the work was ready for fixing on board, and £1800, the balance, when the steamship was fully completed and tried under steam. The work was to be executed to the satisfaction of the company's inspector, *upon whose certificate alone the payments were to be made.* The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery by the defendants on board the vessel, and the adaptation of the old machinery to the new. The defendants completed the boilers and other new machinery, which were ready to be fixed on board, and one installment of £2000 had already been paid by the plaintiffs, when the vessel was lost by perils of the sea. Afterwards the plaintiffs, who knew of the loss of the vessel, although the defendants did not, paid the second installment of £2000. The plaintiffs then claimed delivery of the boilers and machinery, and upon the defendants' refusal to deliver them brought an action for their detention, or in the alternative to recover back the £4000 paid by them to the defendants. The court held, that the contract was in substance one for work and labor to be done by the defendants for the plaintiffs, and not a contract of sale; that it was an entire contract, and that the parties did not intend the property in any part of the boilers and machinery to pass to the plaintiffs until the whole of the work contracted to be done had been completed; and that as the completion of the contract had been rendered impossible by the destruction of the vessel, the plaintiffs were not entitled either to the boilers and machinery or to recover, as on a failure of consideration, the £4000 which they had already paid.]

§ 388. It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel.

When property passes in materials provided for completing unfinished chattel.

In *Woods v. Russell*, (q) the builder became bankrupt on the 30th of June, and on the 2d of July, the purchaser of the ship took from the builder's yard and warehouse, a rudder and cordage, "which the builder had bought for the ship." All that the court said, was: "As to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us

Woods v. Russell.

(q) 5 B. & Ald. 842.

to stand on the same footing as the ship; and that if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof." This point did not arise in *Clarke v.*

Tripp v. Armitage. Spence, but in 1839 *Tripp v. Armitage* (r) was decided in the Exchequer. In that case there was a contract for building a hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys, belonging to the hotel owners, with directions to fit the pulleys into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builder became bankrupt. The court held, that the property in the frames had not passed out of the builder. Lord Abinger put it on the ground, "that there had been no contract for the sale and purchase of goods as movable chattels, but a contract to make up materials and fix them, and until they are fixed, by the nature of the contract the property will not pass." (s) His Lordship put as a test, that if the sashes had been destroyed by fire, the builder would have lost them, for the hotel owners were *not bound to pay for anything till put up and fixed*. Parke, B., said, also: "In this case there is no contract at all with respect to these particular chattels: *it is merely parcel of a larger contract.*"

§ 389. In *Goss v. Quinton*, (t) in 1842, an unfinished ship, which the builder had contracted to deliver, was conveyed to the purchaser and registered in his name, but the rudder intended for the ship remained in the builder's yard, incomplete, when he became bankrupt. The court held that proof that the builder *intended* the rudder for the ship, coupled with proof of the buyer's approval of this purpose, *though not given till after the bankruptcy*, was evidence for the jury that the rudder was part of the ship, and the right of property would be governed by the same considerations as would apply to the body of the ship. But this decision is much questioned, as will presently appear, and could not have been made if the test suggested by Lord Abinger in *Tripp v. Armitage* had been applied; for it is manifest that the incomplete rudder in the builder's yard was at his own risk, and if he had remained solvent, there would have been no pretext, in case of its destruction by fire, to call on the ship-owner to supply another rudder at his own expense.

(r) 4 M. & W. 687.

(t) 3 M. & G. 825.

(s) See *ante*, § 108.

§ 390. In *Wood v. Bell*, (u) the contest turned upon valuable materials as well as upon the frame of the ship, and the decision of the Queen's Bench on this part of the case was reversed in the Exchequer Chamber. The facts were, that steam engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam engines, were spoken of constantly by the builder, before his bankruptcy, as belonging to the "Britannia" engines, that being the name of the ship. There was also a quantity of iron plates and iron angles specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured and prepared expressly for the ship, but not yet fixed or attached to her. The Queen's Bench, after holding that the property in the ship had passed, simply added, "and if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and planking, designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in *Woods v. Russell*." But in the Exchequer Chamber (t) the decision was reversed, Jervis, C. J., giving the judgment of the court, composed of himself, Pollock, C. B., Alderson and Bramwell, BB., and Cresswell, Crowder, and Willes, JJ. It was held that it did not at all follow because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The Chief Justice said: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that *those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel*. But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. *Nothing that has not gone through the ordeal of being approved as part of the ship, passes, in my opinion, under the contract*." The other judges concurred, and the case was sent back to the arbitrator for a new award on these principles, which

(u) 5 E. & B. 772; 6 E. & B. 355; 25 L. J., Q. B. 148, 321. (t) 6 E. & B. 355, and 25 L. J., Q. B. 321.

must now be taken to be the settled law on the point under consideration. (u)

In the opinion delivered by Jervis, C. J., *Woods v. Russell* was doubted on the question of the rudder and cordage, and *Goss v. Quinton* was not only doubted by the learned Chief Justice, but was unfavorably mentioned by other judges during the argument. Cresswell, J., also said: "I am not now better satisfied with the ruling respecting the rudder and cordage in *Woods v. Russell* than I was years ago."

Woods v. Russell and Goss v. Quinton doubted on this point.

§ 391. Upon the third proposition stated at the beginning of this chapter, the reported case most directly in point is *Bishop v. Shillito*. (x)¹⁴ It was trover for iron that was to be delivered under a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery and brought *trover* for what had been delivered. Abbott, C. J., left it to the jury to say whether the delivery of the iron and the re-delivery of the bills were to be contemporaneous, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. Held, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Bayley, J., added: "If a tradesman sold goods, to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

Authorities for third rule.

Bishop v. Shillito.

§ 392. The principle of this decision is fully recognized by the judges in *Brandt v. Bowlby*, (y) when holding that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the bargain he was to accept bills for the price as a condition concurrent with the delivery, and had refused

Brandt v. Bowlby.

(u) See *Baker v. Gray*, 17 C. B. 462; 25 L. J., C. P. 161; *Brown v. Bateman*, L. R., 2 C. P. 272; cf. also *Anglo-Egyptian Navigation Company v. Rennie*, L. R., 10 C. P. 271.

(x) 2 B. & Ald. 329, note (a).

14. See *ante* § 357, *et seq.*, and see *post* § 425, *et seq.*, for decisions upon third rule.

(y) 2 B. & Ad. 932. And see *Shepherd v. Harrison*, L. R., 4 Q. B. 196, 493; L. R., 5 H. L. 116—more fully referred to *post*, Ch. VI.

to perform this condition. (z) So in *Swain v. Shepherd*, (a) Swain v. Shepherd. it was held by Parke, B., that if goods are sent on an order to be returned if not approved, the property remains in the vendor till approval.

To the same effect was the judgment of Lord Ellenborough in *Barrow v. Coles*. (b) This was trover for 100 bags of Barrow v. Coles. coffee shipped by Norton and Fitzgerald of Demerara. They drew for the value upon one Voss, in favor of Barrow the plaintiff, and sent to the latter the bill of lading attached to the bill of exchange. The bill of lading was endorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. When the bill of exchange was sent with the bill of lading to Voss, he accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he endorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the endorsement on the bill of lading, and that by the dishonor of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns.

In a very old case, *Mires v. Solesby*, (c) the agreement was that one Alston should take home some sheep and pasture them Mires v. Solesby. for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase. 15

§ 393. [Under the now common form of agreement for the hire and conditional sale of furniture, the price to be paid by installments, the property in the furniture does not pass Agreement for hire and conditional sale. until all the installments have been paid. 16

(z) See, also, 2 Wms. Saund. 47 u. note.

(a) 2 Mood. & Rob. 223.

(b) 3 Camp. 92.

(c) 1 Mod. 243.

15. Reitz's Appeal, 64 Penna. 162.

16. Installment Sales or Leases.—The decisions upon contracts of this character are numerous in America. Many recent cases hold that where it is apparent that the contract, though nominally a hiring, is in reality a conditional sale, the

Thus in *Ex parte Crawcour*, (d) where there was an agreement between Crawcour and one Robertson for the hire of some furniture, under which, if Robertson paid certain installments of money month by month the furniture was to become his property, he undertaking at the same time to deposit with Crawcour, as collateral security, promissory notes to the full amount of the installments to be paid; it was *held*, that until the payment of all the installments, the property in the furniture did not pass to Robertson.

It should be noted that the agreement in question expressly provided that the property should not pass until the payment of all the installments, but it is submitted that the result would have been the same even in the absence of any such provision.]

AMERICAN DECISIONS.

§ 394. The cases in America upon the subject of this chapter are not in all respects identical with those decided in our courts.

In *Crofoot v. Bennett*, (e) ¹⁷ a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee, that he might take the quantity bought. Held, that the property had passed in the number sold. Strong, J., in delivering the opinion, said: "It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. * * * The reason is that the sale cannot be applied to any article until it is clearly designated, and its identity thus

courts will so regard it, looking to the substance rather than the form. *Murch v. Wright*, 46 Ill. 487, stated *post* § 453; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, stated *post* § 454; *Heryford v. Davis*, 102 U. S. 235, stated *post* § 455; *Greer v. Church*, 13 Bush 430, stated *post* § 457; *Cole v. Berry*, 42 N. J. L. 308, stated *post*, § 433; *Sumner v. Cotey*, 71 Mo. 121, stated *post*, § 439; *Rowe v. Sharp*, *Crist v. Kleber and Enlow v. Klein*, stated *post* § 446; *Brunswick v. Hoover*, 10 Weekly Notes of Cases (Penna.) 219, stated *post* § 458; *Singer Co. v. Holcomb*, 40 Iowa 33; *Myer v. Car Co.*, 102 U. S. 1; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597. See, also, *ante* § 2, note on page 10, "Sale or Lease."

(d) 9 Ch. D. 419, C. A. As to this custom of furniture dealers, see *Ex parte Powell*, 1 Ch. D. 504, C. A. and *Crawcour v. Salter*, 18 Ch. D. 30, C. A.

(e) 2 Comstock (N. Y.) 258.

17. For American cases as to sales of chattels not specific, see next chapter.

ascertained. In the case under consideration, it could not be said with certainty that any particular bricks belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, *as upon the object which is to be effected by it*. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected." (g)

§ 395. [The same distinction was maintained in *Groat v. Gile*. (h) The defendant contracted to sell to the plaintiffs two flocks of sheep "except two bucks and a lame ewe," at four dollars a head. The plaintiffs had examined the sheep, and the excepted animals had been identified; they also paid twenty-five dollars on account of the purchase. The sheep were to be taken, and the balance paid at a subsequent specified time; meanwhile the vendor was to pasture them. Within the time named the plaintiffs paid the balance of the purchase money, and took away the sheep; but meanwhile the defendant had shorn the sheep, and converted the wool to his own use. The action was to recover the value of the wool, and the plaintiffs were held entitled. The court said, "All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that they were sufficiently identified. Under such circumstances, when the terms of the sale were agreed on, and the payment of twenty-five dollars was made to the defendant on account of the purchase

(g) See, also, *Bradley v. Wheeler*, 44 N. Y. 495; *Groat v. Gile*, 51 N. Y. 431, and 2 Kent 496. *nett, Bradley v. Wheeler, and Kimberly v. Patchin*, cited below, were referred to with approval.

(h) 51 N. Y. 431, where *Crofoot v. Ben-*

money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs, and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to *take* them without any agency in delivering them on the part of the defendant, and they from the time the agreement was made became the owners thereof.”]

§ 396. In *Kimberly v. Patchin*, (i) the owner of a large mass of wheat lying in bulk gave the vendee a receipt acknowledging himself to hold 6000 bushels, sold for a specified price, subject to the vendee's order: and the title was held to have passed by the sale. *Whitehouse v. Frost* (*post* Ch. IV.) was followed and approved.

In *Russell v. Carrington*, (k) the Court of Appeal of New York applied the same principle to similar facts.¹⁸

In *Oliphant v. Baker*, (l) the vendor sold barley in bulk at a certain price per bushel, the quantity to be afterwards ascertained. The barley being in the vendor's storehouse, which was to be surrendered to another person at a future day, it was agreed that the barley should be allowed to remain in the storehouse till the vendor transferred the possession of the building: and the purchaser agreed with the transferee of the building to pay storage after that time. The goods were destroyed by fire before being measured, but after the building had passed out of the possession of the vendor. Held, that the facts showed an intention to pass the property in the barley notwithstanding it had not yet been measured, and that the loss must fall on the buyer.

§ 397. In *Rourke v. Bullens*, (m) the vendor sold a hog on credit, the hog to be kept and fattened till the buyer called for it, and then to be paid for at the current market price according to its weight when called for, and this was held to be a contract purely executory, not passing the property to the buyer.

In *Cushman v. Holyoke*, (o) where the property had actually passed

(i) 19 N. Y. 330. See, also, *Foot v. Marsh*, 51 N. Y. 288, where *Kimberly v. Patchin* was distinguished.

(k) 42 N. Y. 118.

(l) 42 N. Y. 118.

18. These cases relating to sales of

chattels not specific are considered in the next chapter.

(i) 5 Denio (N. Y.) 379.

(m) 8 Gray (Mass.) 549. See *Marble v. Moore*, 102 Mass. 443.

(o) 34 Maine 289.

to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to the removal according to the common course of conveyance.

Oushman v. Holyoke.

§ 398. The cases of *Woods v. Russell* and *Clarke v. Spence* have not met with universal acceptance in America. Thus, in *Andrews v. Durant*, (*p*) the New York Court of Appeal held, in a case where the facts were similar to those in the above cases, that the property did not pass to the party ordering the goods till the completion of the work: and the same decision was given in Massachusetts in *Williams v. Jackman*, (*q*) decided in the Superior Judicial Court in January, 1861. In these two cases the decision of the Exchequer Chamber in *Wood v. Bell* (*r*) was not before the courts, not being cited in the latter case, and the former case bearing date in 1853, three years before the decision in the Exchequer Chamber.

American criticisms on *Woods v. Russell* and *Clarke v. Spence*.

Andrews v. Durant.

Williams v. Jackman.

§ 399. [In *Briggs v. A Light Boat*, (*s*) there was a contract to build three light vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion; and it was provided that the United States might at any time declare the contract null. It was held that under this contract no title to the vessels passed to the United States until their completion and delivery. *Bigelow, C. J.*, in an exhaustive judgment, says at p. 292 of the report: "Upon established principles of law, we think it clear that no property in the vessel, which is the subject of controversy in this action, vested in the United States until the vessel was completed and delivered, in pursuance of the contract with the builder. The general rule of law is well settled and familiar, that, under a contract for building a ship or making any other chattel, not subsisting in specie at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, founded for the most part on express stipulations in contracts, by which the property is held

Briggs v. A Light Boat.

Opinion of *Bigelow, C. J.*

(*p*) 1 Kernan (N. Y.) 35.

(*q*) 16 Gray (Mass.) 514.

(*r*) 6 E. & B. 355; 25 L. J., Q. B. 321.

(*s*) 7 Allen 287.

to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular agreement in a contract concerning the mode or time of making payment of the purchase money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text writers, that an agreement to pay the purchase money in installments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work, and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant, as indicating the intention of the parties, but they are not in all cases decisive. Both of them may co-exist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction under a contract passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him.

A question of intention arising on the interpretation of the entire contract in each case.

It is a question of intent arising on the interpretation of the entire contract in each case. If, taking all the stipulations together, it is clear that the parties intended that the property should vest in the purchaser during the progress of the work, and before its completion, effect will be given to such intention, and the property will be held to pass accordingly; but, on the other hand, it will not be deemed to have passed out of the builder, unless such intent is clearly manifested, but the general rule of law will prevail." And he then proceeded to show that, upon the contract before him, no intention was indicated to take the case out of the general rule, but, on the contrary, there were several stipulations which clearly showed a different intention.] *

SECTION I.—FIRST RULE—AMERICAN DECISIONS.

§ 400. To the foregoing decisions stated by our author, the following are added by the American editor.

* The rest of this chapter is by the American editor.

Lord Blackburn's first rule, above stated in § 364, is universally recognized as a valuable aid in determining the intent in doubtful cases. American decisions under the first rule

In *The Elgee Cotton Cases*,¹⁹ the contract of sale was in writing, in substance as follows: "We have sold our crops of cotton, about 2100 bales, for ten cents per pound, to be delivered at Fort Adams Landing, to be paid for when weighed, the buyer to furnish bagging, rope and twine to bale the cotton unginne. We acknowledge receipt, to confirm the contract, of \$30. This cotton will be received and shipped by D. & Co., of New Orleans, *and from this date is at the risk of the buyer.*" This cotton was seized by the agent of the United States (during the Vicksburg campaign), and after the war, claims were made for its value by both seller and buyer, and the question arose, which was entitled to it? Justice Strong quoted the first and second rule, of Blackburn, J., (*ante* §§ 364, 365), and discussed the subject at length. After remarking that weighing was necessary to ascertain the price (see 2d rule), he continues: "Added to this is, we think, a very significant circumstance. The contract shows that a portion of the cotton was not in a condition for delivery. The subject of the contract was baled cotton, and the buyer bargained for that. Nothing in the contract shows clearly how much of the cotton was unginne and how much was unbaled, but it reveals that a portion was, and certain it is that it was considered essential that all which had not been ginne and baled and bagged, should be put into that condition before the vendee was required to accept it. And this the sellers were required to do. * * * We do not deny that a person may buy chattels in an unfinished condition and acquire the right of property in them, though possession be retained by the vendor in order that he may fit them for delivery. But in such a case the intention to pass the ownership by the contract cannot be left in doubt. The presumption is against such an intention." In reply to the argument that title passed because the risk was placed in the buyer, Justice Strong said: "Instead of showing an intention of the parties that the right of property should pass to him, it seems rather to indicate a purpose that the ownership should remain unchanged, else why introduce a provision totally unnecessary? Such was the inference drawn from the introduction of a similar clause in a contract considered in *Martineau v. Kitching*, L. R., 7 Q. B. 436."

19. 22 Wall. 180, 193

§ 401. *Smith v. Sparkman*²⁰ is also a case where cotton was sold, to be ginned and baled by the seller. Before he had finished baling, the cotton was attached for the seller's debt. The buyer put in a claim for the property, for which he had paid in full. Simrall, C. J., said: "The contract was for five bales of cotton of a certain weight. At that time Lewis (the seller) did not have a bale of cotton. He did have a bulk of cotton in the seed, more than enough when ginned and baled to fulfill his contracts. The parties intended that Lewis should put the cotton in merchantable shape by ginning and baling." The attachment was sustained.

In *Bond v. Greenwald*²¹ a planter sold his crop of cotton to be baled by him, and delivered at a fixed price per pound. Part of it was baled and taken away. The rest was baled, but before it was taken it was seized by federal soldiers. Held, reversing the Chancellor, that title passed as soon as the baling was completed.

§ 402. In *Pritchett v. Jones*²² a lot of hides in a tanner's vats were sold to a creditor of the tanner. Some of them were marked by the buyer, and all were to be delivered when tanned, and to be credited on the debt. Before they were finished they were levied upon for debts of other creditors. The court held that the title had not passed and that the levies were good. Gibson, C. J., said: "The parties dealt expressly in reference to the price which the leather would fetch when fit for the market, and having treated in reference to a future condition of the article, a future price, and a future delivery, the contract was necessarily executory, as every sale of an unfinished article must be when not sold and delivered as such. * * * What seems conclusive in all cases of retained possession for purposes of completion is, that the customer would not be bound to accept the article if it were injured by unskillfulness, or finished in an unworkmanlike manner; and the contract being thus shown to be executory, it would follow that the customer has no property in the thing which he could enforce even against the seller." This case does not accord with the weight of authority. See *ante* § 378, and cases referred to in note 10.

§ 403. In *Keeler v. Vandervere*²³ a lot of hops were sold, to be baled by the seller. They were improperly baled and that caused them to ferment, and the buyer rejected them. Held, that title

20. 55 Miss. 649.

21. 51 Tenn. 453. See *McCrae v. Young*, 43 Ala. 622.

22. 4 Rawle 260, 266. See *Thompson*

v. Franks, 37 Penna. 327, 329. See, *contra*, *Graff v. Fitch*, 58 Ill. 373.

23. 5 Lans. 313.

remained in the seller and the loss was therefore his, and the buyer was warranted in rejecting the hops because, though good when contracted for, they were not merchantable when tendered.

In *Foster v. Ropes*²⁴ the sale was of a cargo of codfish, which the seller was to dry and weigh. Part were shipped to the buyer in New York, and he returned them as unmerchantable, and refused the rest. The seller sued for the whole as goods sold and delivered, and recovered a verdict. On exceptions, Colt, J., stated Lord Blackburn's first rule, (*ante* § 364): "This general rule will not prevail where, by the terms of the agreement, the title is to vest immediately in the buyer, notwithstanding something remains to be done to the goods by the seller after delivery. In all cases, however, the intention of the parties as to the time when the title is to pass, can be ascertained only from the terms of the agreement, as expressed in the language and conduct of the parties, and as applied to known usage, and the subject matter. It must be manifested at the time the bargain is made. In the case at bar it was not in dispute that by the contract the fish were to be further dried by the plaintiff and afterwards weighed, for the purpose of ascertaining the quantity and price. This was to be done for the purpose of fitting the goods for delivery. By the general rule, therefore, the property remained in the plaintiff, unless there is evidence that would justify the jury in finding that by further agreement the title was to pass immediately. We can find no evidence of such agreement." Therefore a new trial was ordered.

§ 404. In *Groff v. Belche*²⁵ a farmer sold 1000 bushels of oats to be threshed by him and placed in bins for the purchaser, which was done. When the purchaser took away the oats part of them had become unmerchantable since they were stored, and he sued for breach of warranty. Hough, J., said: "Although the money had been paid, the contract of sale was undoubtedly executory, until the oats were threshed and measured. When the oats were threshed and measured, the property in them passed to the plaintiff. * * * In the absence of any evidence of negligence on the part of defendant in securing them against the weather, the plaintiff must bear any loss resulting from natural causes after they were so stored."

§ 405. *Wilkinson v. Holiday*²⁶ was a case of a contract to sell logs. The seller was to run the logs down a river to a certain boom, where.

24. 111 Mass. 10, 15.

26. 33 Mich. 386.

25. 62 Mo. 400.

they were to be scaled and measured, and paid for at \$8 per thousand feet. The buyer not receiving the logs, sued to recover back an advance payment. Cooley, C. J., said: "Where, under a contract for the purchase of personal property, something remains to be done to identify the property, or to put it in condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that by the understanding of the parties, the title was not to pass until such act had been fully done and accomplished. But the presumption is by no means conclusive. * * * The charge of the judge assumed that the title to the logs passed to the purchaser as soon as they had been delivered at the place which the jury should find was the one agreed upon. Perhaps the jury may have reached this conclusion as an inference of fact from the evidence, but we cannot say that the opposite conclusion would have been unwarranted. However this may be, the question was one of fact, not of law."

§ 406. In *Howell v. Pugh*²⁷ the owner of a farm leased it to a tenant who was to deliver as the rent one-half of the wheat threshed, and one-third of the corn in the crib. While the wheat was in the stack unthreshed and the corn was half grown, the owner sold his interest for \$100. After the sale it was attached for his debts. Held, that it was competent for the owner to make a sale of his interest at any time, and the jury having found that there was a present sale, their verdict was sustained.

In *Thompson v. Conover*²⁸ a quantity of corn was sold at a fixed price per bushel, to be shelled and delivered by the seller. It was held that title had passed as to so much thereof as had been shelled and delivered, and not as to the residue.

§ 407. Sales to arrive are conditional sales, and the property does not pass until the goods arrive. See *post* Book IV., Part I., "Conditions." In *Hooper v. Chicago & N. W. R. R.*²⁹ a suit was brought by the consignor of goods against a common carrier for the destruction of the goods on their way to the consignee. The objection was raised that the goods were the property of the consignee, who should sue. Dixon, C. J., said: "The bill of lading is not conclusive evidence as to the ownership of the goods. It may raise a presumption of title in the consignee, but such presumption is

27. 27 Kan. 702; *Graff v. Fitch*, 58 Smith, 36 N. J. L. 148, 154; *Shields v. Ill.* 373.

28. 32 N. J. L. 466.

Pettee, 4 N. Y. 122; *Benedict v. Field*, 16 N. Y. 595, 597.

29. 27 Wis. 81, 91. See *Neldon v.*

open to be explained or repelled by parol evidence to the contrary. In this case the proof was that the flour was 'sold to arrive at Boston.' By such contract there was no complete sale, or title vested in the consignees until arrival at Boston. It was a sale upon that condition, and the property remained in plaintiff."

§ 408. *Andrews v. Durant*, cited *ante* § 398, was founded on *Merritt v. Johnson*.³⁰ In *Haltertine v. Rice*,³¹ the buyer made a payment of nearly the entire price for an unfinished cutter, which the seller was to finish within ten days. The seller became bankrupt without having finished the cutter. The buyer brought trover for its value against the seller's assignee. It was held that no title had passed to the buyer, following *Andrews v. Durant*.

In *re Derbyshire's Estate*³² is a case where the executor of a ship-builder's estate turned over an unfinished ship to persons claiming to be owners, who had paid installments to the builder as the work proceeded. The estate proving insolvent, creditors claimed that the ship was an asset of the estate and that the ship-owners were merely creditors and should have received only a dividend with the others. Clayton, P. J., reviewed the conflicting English and New York cases and adopted the English construction as applicable to Pennsylvania, and held that the property was in the persons for whom the vessel had been constructed. But on appeal, the Supreme Court affirmed the judgment on the sole ground that the executor had acted within his discretion in turning over a vessel which he was not able to complete.³³

§ 409. In New Jersey the law as to title to unfinished chattels has been settled by several decisions of authority. In *West Jersey Railroad Co. v. Trenton Car Works*,³⁴ a contract was made for the construction of five cars. The buyer furnished plush for the seats for a price amounting to more than the price of one car, and to be deducted from the bill for the five cars. One of the cars came into the possession of the buyer without the manufacturer's consent, and trover was brought for its value against the company which held under the buyer. Vredenburg, J., in New Jersey Court of Errors and Appeals, said: "Taking this evidence most strongly in favor of the railroad company, it is the case of an executory contract for the sale of an article not in existence, but *to be* manufactured, and where

30. 7 Johns. 473.

31. 62 Barb. 593.

32. 11 Phil. 627.

33. *Derbyshire's Estate*, 81 Penna. 18.

See, also, *Clemens v. Davis*, 7 Penna. 263.

34. 32 N. J. L. 517.

the contract price is paid in advance. But in such cases, no title passes until the thing is finished, and is either delivered to the orderer, or is appropriated to his benefit or set apart for him or is accepted by him. * * * Nor would it alter the case if we do not consider this furnishing of the plush as payment, but as the property of D. (the buyer), and put in the car by the manufacturer. The car would still remain the property of the manufacturer, and the plush pass to him as the owner of the car."

§ 410. In *Elliott v. Edwards*,³⁵ the contract was for the construction of a vessel, price payable by installments as the work progressed. It was expressly agreed that as the installments should be paid, the vessel as far as constructed should become the property of the buyers. Persons furnishing materials filed liens against the vessel and against the builder as owner. In the Supreme Court, Van Syckel, J., approves *Groves v. Buck*³⁶ and *Mucklow v. Mangles*,³⁷ says that *Woods v. Russell*³⁸ is not easily reconciled with established principles, and approves *Andrews v. Durant*³⁹ and *Mixer v. Howarth*.⁴⁰ The title thus being in the builder, it devolved on the buyers to show that payments divesting that title, under the terms of the agreement, were made before the materials of the claimants were furnished, and their lien thereby attached. In the absence of proof on this point, the liens were sustained. This cause was carried by writ of error to the New Jersey Court of Errors and Appeals, and was affirmed, *sub nom.* *Edwards v. Elliott*.⁴¹ Scudder, J., follows *Andrews v. Durant*⁴² and *Laidler v. Burlinson*,⁴³ refuses to follow *Woods v. Russell*⁴⁴ and *Clarke v. Spence*,⁴⁵ and approves, as "accurately expressed," the language of the Supreme Court "that on an executory contract to build a vessel, to be paid for in installments as the work progresses, the title remains in the builder until the work is completed and delivered." It will be observed that the court recognized the validity of the express agreement that title should pass as fast as payments were made; but in the absence of proof of the time when such payments were made, it was presumed that title was still in the manufacturer when building materials were furnished, and thereby a lien attached which could not be divested by a subsequent transfer.

35. 35 N. J. L. 265.

36. 8 M. & S. 178.

37. 1 Taunt. 318.

38. 5 B. & A. 942, *ante* § 383.

39. See *supra* § 398.

40. 21 Pick. 205.

41. 36 N. J. L. 449.

42. 11 N. Y. 35.

43. 2 M. & W. 602.

44. 5 B. & A. 942, *ante* § 383.

45. 4 Ad. & E. 448, *ante* § 384.

§ 411. *Andrews v. Durant* (*supra* § 398,) was approved, in Massachusetts, in *Williams v. Jackman*.⁴⁶ That case was distinguished from the English decisions by the fact that the installments did not relate to the progress of the vessel; but Bigelow, C. J., referring to the English cases, says: "To say the least, some of those decisions rest upon very questionable grounds." In *Briggs v. A Light Boat*, stated *ante* § 399, the court made the same ruling. This was followed in *Wright v. Tetlow*.⁴⁷ In *Bennett v. Platt*⁴⁸ a wagon was ordered to be built, price payable in mutton. The mutton was furnished and the wagon was completed, but not in the time stipulated. The court quoted *Mucklow v. Mangles*⁴⁹ "that no property in such case vests until the thing is finished and delivered." But the case was decided on the ground that by suing for the value of the mutton, the buyer had elected to rescind the contract, and could not afterwards claim property in the chattel.

§ 412. In *Green v. Hall*⁵⁰ a ship-builder contracted to build a ship for Hall, receiving payment in three equal installments as the work progressed. After the ship was two-thirds finished and two-thirds paid for, it was attached and sold by creditors of the builder; but Hall having obtained possession refused to give it up, and trover was brought against him. Gilpin, C. J., said that the doctrine of appropriation announced in *Woods v. Russel* and *Clark v. Spence* had never been followed in America, and cited and followed *Merritt v. Johnson* and *Andrews v. Durant*, (*supra* §§ 398, 408.) But in every case the question was one of intent, and on the facts before the court it was not reasonable to suppose that the property was to pass before completion, especially as the ship was to be delivered at Philadelphia and pass inspection there.

§ 413. *Wood v. Bell*, stated *ante* § 386, was followed in *Bank of Upper Canada v. Killaly*.⁵¹ In that case cars were manufactured under the supervision of an agent of the buyer, payment to be made monthly as the work progressed. Held, that title vested without delivery.

Woods v. Russell and *Clarke v. Spence* (*ante* §§ 383, 384,) were followed by Clifford, J., in *Scudder v. Calais Steamboat Co.*⁵² in a

46. 16 Gray 514, 518.

47. 99 Mass. 397.

48. 9 Pick. 558.

49. 1 Taunt. 318. See *Phelps v. Willard*, 16 Pick. 29.

50. 1 Houst. (Del.) 506; on writ of error, *Id.* 546. See, also, *Cowgill v. Ford*, 2 Houst. 164.

51. 21 U. C. Q. B. 9.

52. 1 Cliff. 370, 378.

case of a ship, but the decision was reversed in the United States Supreme Court on other grounds. ⁵³

SECTION II.—SECOND RULE—AMERICAN DECISIONS.

§ 414. The second rule (*ante* § 365) has been recognized and frequently followed in this country, but in many cases it has been considered as entitled to little weight. Justice Blackburn says that the second rule seems to be adopted somewhat hastily from the civil law, that weighing must from the nature of things be intended to be done before *possession* is given, but that is a different thing from intending it to be done before the vesting of the property. Still, he concludes that the question is settled by controlling authority in England.

American decisions under second rule.

§ 415. In *Nesbit v. Burry*,⁵⁴ oxen were sold for three cents per pound, weight to be ascertained by the scales at Mt. Jackson, and \$10 was paid on account. It was found that the scales were out of order, and the seller refused to weigh them elsewhere or to carry out the sale. The buyer brought replevin. It was held that title had not passed. Lowrie, J., said: "The weighing being necessary to a perfect sale where there is no delivery, is not dispensed with by an unsuccessful attempt to weigh or by a refusal to try a better mode of doing it. * * * The vendor might refuse performance subject to the vendee's right to damages for breach."

In *Nicholson v. Taylor*,⁵⁵ the sale was of a cargo of lumber to be measured, and title was held not to pass until measurement, no actual delivery having been made.

In *Sherwin v. Mudge*,⁵⁶ a stock of goods was sold for seventy-five per cent. of the invoice prices. The total price was designated subject to corrections. "Delivery to be made and price paid as soon as the quantities can be verified." Gray, C. J., said that the words last quoted showed that the parties intended that transfer and payment should both be postponed until the quantities of the goods were verified and the price thereby ascertained. Accordingly, it was held that the seller must pay a tax imposed after the contract and before the delivery. ⁵⁷

53. 2 Black 372.

54. 25 Penna. 208.

55. 31 Penna. 128. See *Lester v. McDowell*, 18 Penna. 91, 94.

56. 127 Mass. 547.

57. See *Barnard v. Poor*, 21 Pick. 378; *Foster v. Ropes*, 111 Mass. 10, 15; *Westfield v. Mayo*, 122 Mass. 100; *Mason v. Thompson*, 18 Pick. 305, 308.

§ 416. In *Kein v. Tupper*,⁵⁸ it appeared that 119 bales of cotton were sold, to be weighed, and samples compared with those by which it was sold. Seventy bales were weighed and sampled in the warehouse, and the weighing and sampling of the residue were to take place the next day. That night all the bales burned. It was held that title had not passed to the bales not weighed because something remained to be done by the seller to ascertain the quantity, and that title had not passed to the bales weighed because the contract was entire. This was distinguished in *Burrows v. Whitaker*, (§ 424, *post.*) where a contract for lumber to be taken away and paid for as delivered was held to be separable.

In *Frost v. Woodruff*,⁵⁹ wood was contracted for, to be cut, piled and measured by the seller. After it was cut, but before it was piled or measured, it was levied upon for a debt of the seller, and the levy was sustained.

§ 417. The law on this subject was settled in Michigan by the case of *Lingham v. Eggleston*.⁶⁰ The agreement was in writing for the sale of all the pine lumber in the seller's yard, to be sorted, and \$11 per thousand to be paid for the best, and \$5.50 for the inferior grade. Part of the lumber was delivered, but most of it was destroyed by fire before it had been assorted or measured. The seller sued for the price on a count for goods bargained and sold. Cooley, J., said that the question whether title had passed was one of intent—that the most important fact to determine the intent is usually delivery; that where the vendor has done all that is incumbent upon him, title may pass, though the quality and quantity, and therefore the price, are still to be determined by the buyer; and this is true though the seller is still to do something with the goods for the buyer. But the authorities hold that when anything is to be done by the seller, or by both buyer and seller to ascertain the price, as by weighing, measuring or testing, when the price depends on quantity or quality, these things must be done before title passes. In regard to the case before the court, the fact that the seller was to make delivery was not important, the specific goods having been ascertained. "What is of more importance," continues Cooley, J., "is that neither the quality nor the quantity was determined, and the evidence in the case shows that as to these there might very well

58. 52 N. Y. 550.

ver, 7 Bradw. 450, 454.

59. 54 Ill. 155. See *Toledo, &c., Co. v.*

60. 27 Mich. 324.

Chew, 67 Ill. 378, 382; *Hoffman v. Cul-*

be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had. * * * It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and this, under all the authorities, was presumptively a condition precedent to the transfer of the title, nothing to the contrary appearing."

In *McDonough v. Suttan* ⁶¹ a number of hogs were contracted for by the pound, a small sum was paid down, and the residue was to be paid on delivery, when they were to be weighed. Before receiving them the buyer resold, receiving a partial payment, the rest to be paid on delivery. The hogs were delivered, but the second buyer failed to make the remaining payment on the day fixed, and the first buyer on the following day sold again to another purchaser. Held, that the first buyer could not, by tender of payment, maintain trover, for the ownership of the hogs had never vested in him.

In *Pike v. Vaughn* ⁶² it was held that the title did not pass to logs delivered until scaled to settle the price, unless the parties expressly agreed that it should pass. See further on this subject the cases cited in the note. ⁶³

§ 418. *But delivery to the Buyer will pass the Property, though the Goods sold are afterwards to be Weighed, Counted or Measured.*—Payment is also an important circumstance throwing light on the intent. Any circumstance indicating an intent that title shall pass at once by the contract is to be considered. But delivery is the most important fact indicative of an intent that title shall pass. ⁶⁴

In *Macomber v. Parker* ⁶⁵ Wilde, J., said: "Where the goods are actually delivered, that shows the intent of the parties to complete the sale by delivery; and the weighing or measuring, or counting afterwards, would not be considered as any part of the contract of sale, but

61. 35 Mich. 1.

62. 39 Wis. 499.

63. See *Hahn v. Fredericks*, 30 Mich. 223; *Scotten v. Sutter*, 37 Mich. 526; *Hatch v. Fowler*, 28 Mich. 205; *Prescott v. Locke*, 51 N. H. 94, 103; *Jones v. Pearce*, 25 Ark. 545, 554; *Bailey v. Long*, 24 Kan. 90, 97; *Strauss v. Ross*, 25 Ind. 800; *Lester v. East*, 49 Ind. 588; *Gibbs v.*

Benjamin, 45 Vt. 124, 128; *Jordan v. Harris*, 51 Miss. 287; *Beauchamp v. Archer*, 58 Cal. 431; *Williams v. Allen*, 16 Humph. 337; *Balton v. Currie*, 19 U. C. Q. B. 34; *Robertson v. Strickland*. 28 Id. 221, 229.

64. *Lingham v. Eggleston*, 27 Mich. 324, 328.

65. 13 Pick. 175, 183.

would be taken to refer to the adjustment of the final settlement of the price. The sale would be as complete as a sale upon credit before the actual payment of the price."

§ 419. In *Cunningham v. Ashbrook* ⁶⁶ a lot of hogs were delivered to the buyer to be slaughtered by him, and paid for by the pound, dressed. After they were slaughtered, but before they were weighed, they were burned up. It was held that title had passed, and a suit for the price was sustained.

Macomber v. Parker and *Cunningham v. Ashbrook* were approved and followed in *Haxall v. Willis*. ⁶⁷ In that case wheat was delivered at Gordonsville, to be taken charge of there by the buyer and transported to Richmond at the cost of the seller, and was there to be reweighed, to ascertain the quantity. At the Richmond R. R. depot the wheat was destroyed by fire. Daniel, J., questioned the correctness of the second rule of Justice Blackburn, and after a review of the cases, said: "I do not think that there is anything to be found in the reported decisions of this court, which should constrain us to oppose that current of decision which is strongly tending to the re-establishment of the common law rules upon the subject, and which, in the language of the court in *Macomber v. Parker*, considers such an understanding about the weighing, at least when it is to be done after an actual change of possession, not as a part of the contract of sale, but as referring to the adjustment of the final settlement of the price."

§ 420. *Riddle v. Varnum* ⁶⁸ is a case often cited. Lumber in a canal was sold, to be taken out by the buyer and paid for as it might measure. It was attached before removal from the pond, for a debt of the buyer, and the seller brought trover. The court held that it was a question for the jury whether title passed on the sale. This was decided on the authority of *Macomber v. Parker*, *supra*, and was followed in New Jersey in *Boswell v. Green*. ⁶⁹

A similar principle was recognized in Pennsylvania in *Scott v. Wells*. ⁶⁹ The sale was of a raft of boards at a certain rate per thousand. The buyer took possession, and the quantity being in dispute was to be afterwards ascertained by measurement, but a freshet swept it away. Held, that title had passed by the delivery. This case was

66. 20 Mo. 555. This case has been often followed in Missouri and elsewhere. See *S. W. Freight, &c., Co. v. Stanard*, 44 Mo. 71, 83; *Ober v. Carson*, 62 Mo. 209, 213.

67. 15 Gratt. 434.

68. 20 Pick. 230. Followed, 25 N. J. L. 390.

69. 6 W. & S. 357, 366.

followed in *Dennis v. Alexander*.⁷⁰ The court said: "It is not law that the right of property could not pass, so long as the quantity of the thing sold remained to be ascertained. It is only where something remains to be done for the ascertainment of the quantity, *by the very terms of the contract*, that it is incomplete." And in that case a sale was sustained of a cargo of potatoes not yet measured, at a fixed price per bushel. The rule stated in this case has been often quoted, but seems to be of no value whatsoever. The terms of the contract may be implied as well as expressed; and whenever measurement is necessary to ascertain the price, it is always an implied term of the contract that such measurement shall take place. *Scott v. Wells* is stated in *Bigley v. Risher*⁷¹ to be the leading case in Pennsylvania as to what constitutes a complete sale of a chattel.

§ 421. In *Odell v. Boston and Maine R. R.*⁷² hay was contracted for to be delivered at the depot in Exeter, and sent by rail to the purchaser at Boston, where it was to be weighed by the hay inspector, to fix the price. The hay was delivered at the depot and marked with the buyer's name, but subsequently the seller directed a change of address. The buyer sued the railroad company for the value of the hay, and a recovery was sustained. Wells, J., said: "Upon receipt of the hay by the defendant, the title became immediately vested in the plaintiff. The provision for weighing, after its arrival in Boston, was merely to determine the amount to be paid by the plaintiff."

In *Russell v. O'Brien*⁷³ goods were to be delivered by a steamship at a wharf and tested by the buyer, and damaged packages rejected on the wharf. A cargo having arrived, the seller delivered a written order to the employee of the buyer, who notified the delivery clerk of the steamship company, but before the goods were removed from the vessel they were attached by a creditor of the seller. It was held that these facts would warrant a verdict that title had passed to the buyer as against the attaching creditor.

In *Bethel Steam Mills Co. v. Brown*⁷⁴ lumber was sold to be delivered by the seller at a point on the river, but was marked with the buyer's mark at the time of the contract. Held, that title passed at the time of the contract.

§ 422. In *Seckel v. Scott*⁷⁵ (stated *ante* § 320) the cases on this sub-

70. 3 Penna. St. 50.

71. 63 Penna. 152, 155.

72. 109 Mass. 50. But see *Wenger v. Barnhardt*, 55 Penna. 300.

73. 127 Mass. 349.

74. 57 Me. 90. See *Dyer v. Libby*, 61

Me. 45; *Morrow v. Reed*, 30 Wis. 81.

75. 66 Ill. 106, 109.

ject are reviewed, and *O'Keefe v. Kellogg* and *Holliday v. Burgess*⁷⁶ are cited and approved as sustaining the proposition "that a sale of specific chattels by weight, and the price agreed upon between the parties, may be a complete sale, although the articles have not been weighed, if the parties intended it should be complete."

In *Adams Mining Co. v. Senter*⁷⁷ a raft of timber was sold, and the man in charge was instructed to hold it for the buyer, and to measure it for both parties. The question arose whether title had passed before measurement, and it was held that it had. This was followed in *Colwell v. Keystone Iron Co.*⁷⁸ The same conclusion was reached in *Sewell v. Eaton*,⁷⁹ following *Riddle v. Varnum* and *Macomber v. Parker*, *supra*, and in *Morrow v. Reed*.⁸⁰

*Leonard v. Davis*⁸¹ was a sale of logs floating in the water, and it was held that title passed on the making of the contract, though the logs were to be scaled and measured by the boom-master, to ascertain the price. *Riddle v. Varnum* and *Cunningham v. Ashbrook*, *supra*, are followed.⁸²

§ 423. In *Sedgwick v. Cottingham*,⁸³ wheat was sold to be sent by rail to the buyer and weighed by him. The seller placed the wheat in a car which reached its destination, but before it was unloaded it was swept away by a flood. The seller sued the buyer for the price, and it was held that he was entitled to recover. Seevers, J., said: "The weighing is not a pivotal matter. It was to be done by the defendant after he had received it into his actual custody and after it had been delivered at the place fixed by the contract."

In *King v. Jarman*,⁸⁴ the facts of which are stated *ante* § 323, Eakin, J., said that the seller having given all the possession practicable, and having done all that was required of him, title would pass. "And this will be so, notwithstanding something may be still necessary, on the part of the vendee, to ascertain the exact price."⁸⁵

76. 15 Ill. 347, and 34 Ill. 193. See, also, *Köhl v. Lindley*, 39 Ill. 195; *Shelton v. Franklin* 68 Ill. 333, 338; *Barrow v. Window*, 71 Ill. 214, 218; *Callaghan v. Myers*, 89 Ill. 566, 570.

77. 26 Mich. 73, 79.

78. 36 Mich. 51.

79. 6 Wis. 490.

80. 30 Wis. 81, 88.

81. 1 Black 476, 483.

82. See *Cushman v. Holyoke*, 34 Ma.

289; *Bond v. Greenwald*, 51 Tenn. 453, 458; *Bank of Montreal v. McWhirter*, 17 U. C. C. P. 506; *Richmond Iron Works v. Woodruff*, 8 Gray 447; *Ober v. Carson*, 62 Mo. 209.

83. 54 Iowa 512, 515.

84. 35 Ark. 190, 197.

85. See *Chamblee v. McKensie*, 31 Ark. 155, 162; *Shepard v. Lynch*, 26 Kan. 377.

In *Morgan v. Perkins*,⁸⁶ all the corn in a certain building was bargained for at \$2.50 per barrel and a payment was made on account. The corn was to remain in the building till the buyer could take it away on his vessel; but the seller resold it to one against whom the first buyer afterwards brought trover. The suit was sustained, the court finding from these facts that title had passed, though measurement was afterwards to take place to fix the price. Had part only been sold, title would not have passed until separation.

§ 424. In New York the same principles are established. See *Groat v. Gile*, stated § 395, *ante*.⁸⁷ In *Burrows v. Whitaker*,⁸⁸ lumber was delivered at a certain place, to be culled there by the buyer, and then counted to ascertain the price. After delivery of part, but before counting, part was swept away by a flood, and it was held that title had passed and the buyer must bear the loss. The contract was held to be separable, thus distinguishing the case from *Kein v. Tupper* (§ 416, *supra*.)

In *Martin v. Hurlbut*,⁸⁹ a sale of logs was held to be executory, because they were to be scaled and measured by a public officer, and because part of the logs were to be left at the place where they were out, to pay stumpage to the land-owner.

In *McNeil v. Keleher*,⁹⁰ wood was sold, to be piled on the canal bank and paid for at a certain price per ton. It was held on the authority of *Rugg v. Minett*, *ante* § 368, and of *Turley v. Bates*, that title passed as soon as the wood was piled, though it had not yet been measured by the buyer.

SECTION III.—THIRD RULE—AMERICAN DECISIONS.

§ 425. The cases arising under the third rule (*ante* § 366) are those where possession of the property is given to the person agreeing to buy, but title is expressly reserved by the seller until the performance of some condition by the buyer. This condition is usually the payment of the price. These sales express the intent of the parties as to the time when the property shall pass, and as we have seen (*ante* § 309) that the intent controls, there would seem to be no difficulty in the application

Agreements
reserving the
property in
goods delivered
until payment,
are valid be-
tween the
parties.

⁸⁶. 1 Jones N. C. L. 171. See *Allman v. Davis*, 2 Ired. 12.

⁸⁷. See, also, *Hurd v. Cook*, 75 N. Y. 454; *Bradley v. Wheeler*, 44 N. Y. 495.

⁸⁸. 71 N. Y. 291.

⁸⁹. 9 Minn. 142.

⁹⁰. 15 U. C. C. P. 470.

of this rule, nor is there, as between the parties. When third persons claim to have acquired rights in the property sold, from the buyer in possession, questions arise in determining which the American courts have differed widely. But a stipulation reserving title until payment, though possession is given under an agreement to sell, is valid as between the parties and as against third person, with notice. Thus, in *Fosdick v. Schall*,⁹¹ cars were sold to a railroad company, to be paid for by installments, for which notes were given, the cars to remain the property of the seller until paid for. There was a mortgage on the railroad covering all present and future property of the company. Under this mortgage the mortgagees claimed priority to the claim of the seller of the cars. The court held that the mortgagees were not purchasers for value, but had only the mortgagor's rights, and Waite, C. J., said: "As between the parties, the transaction is just what, on its face, it purports to be, a conditional sale, with a right of rescission on the part of the vendor, in case the purchaser shall fail in payment of his installments—a contract legal and valid as between the parties." This doctrine is universally sustained in America, as will appear from the cases cited in the note.⁹²

91. 99 U. S. 235, 250.

92. Maine.—*Rogers v. Whitehouse*, 71 Me. 222. (In this case a stock of goods in a store was sold, to be retailed by the buyer, but title was retained by the seller. This arrangement was held valid except as to the goods retailed. See post § 448.)

New Hampshire.—*Sargent v. Gile*, 8 N. H. 325; *Kimball v. Jackman*, 42 N. H. 242; *McFarland v. Farmer*, 42 N. H. 386.

Vermont.—*Burnell v. Marvin*, 44 Vt. 277; *Root v. Lord*, 23 Vt. 568; *Armington v. Houston*, 38 Vt. 448.

Massachusetts.—*Hussey v. Thornton*, 4 Mass. 405; *Marston v. Baldwin*, 17 Mass. 606; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 6 Pick. 71; *Hill v. Freeman*, 3 Cush. 257; *Coggill v. Hartford, &c., R. R.*, 3 Gray 545; *Burbank v. Crooker*, 7 Gray 158; *Booraem v. Crane*, 103 Mass. 522; *Salomon v. Hathaway*, 126 Mass. 482; *Benner v. Puffer*, 114 Mass. 376. (In this last case the condition was

held valid, though the goods were not in existence at the time of the bargain, but were afterwards delivered under the agreement.)

Rhode Island.—*Goodell v. Fairbrother*, 12 R. I. 233; *Skelton v. Manchester*, 12 R. I. 326.

Connecticut.—*Forbes v. Marsh*, 15 Conn. 384; *Brown v. Fitch*, 43 Conn. 512; *Hine v. Roberts*, 48 Conn. 267.

New York.—*Smith v. Lynes*, 5 N. Y. 41; *Herring v. Hoppock*, 15 N. Y. 409; *Wait v. Green*, 36 N. Y. 556; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Cole v. Mann*, 61 N. Y. 1; *Boon v. Moss*, 70 N. Y. 465; *Nash v. Weaver*, 23 Hun 513.

New Jersey.—*Cole v. Berry*, 42 N. J. L. 308.

Pennsylvania.—*Haak v. Linderman*, 64 Penna. 499, 501; *Enlow v. Klein*, 79 Penna. 488; *Hartley v. Decker*, 89 Penna. 470; *Stadtfeld v. Huntsman*, 92 Penna. 58.

§ 426. The buyer may sell his interest in the property, and if the condition is performed the vendee will obtain complete title.⁹³ If the goods are wrongfully taken from the buyer he, as well as the seller, may maintain trover against the wrongful taker, even after the condition has been broken.

The buyer's interest may be sold.

Delaware.—*Williams v. Connoway*, 8 Houst. 63.

Maryland.—*Hinkley v. Wheelwright*, 29 Md. 341, 348; *Walsh v. Taylor*, 39 Md. 592.

Virginia.—*Leavell v. Robinson*, 2 Leigh 161.

North Carolina.—*Clayton v. Hester*, 80 N. C. 275, where North Carolina cases are collected. *Vassar v. Buxton*, N. C. Sup. Ct., February Term, 1882.

South Carolina.—*Southern v. Cunningham*, 11 Rich. L. 533; *Talmadge v. Oliver*, 14 So. Car. 522.

Florida.—*Johnston v. Eichelberger*, 13 Fla. 230.

Georgia.—*Boyd v. Loftin*, 34 Ga. 494; *Jowers v. Blandy*, 58 Ga. 379.

Alabama.—*Leigh v. Mobile and Ohio R. R.*, 58 Ala. 165.

Mississippi.—*Mount v. Harris*, 1 Sm. & M. 185; *Ketchum v. Brennan*, 53 Miss. 596.

Texas.—*Christian v. Bunker*, 38 Tex. 234; *Sacra v. Semple*, Tex. Sup. Ct., May, 1881, 12 Reporter 507.

Ohio.—*Sage v. Sleutz*, 23 Ohio St. 1; *Sanders v. Keber*, 28 Id. 630; *Carmock v. Gordon*, 2 Cinn. 408.

Michigan.—*Couse v. Tregent*, 11 Mich. 65; *Fifield v. Elmer*, 25 Mich. 48.

Indiana.—*Shireman v. Jackson*, 14 Ind. 459; *Plummer v. Shirley*, 16 Ind. 380; *Bradshaw v. Warner*, 54 Ind. 58.

Illinois.—*Latham v. Sumner*, 89 Ill. 233; *Van Duzor v. Allen*, 90 Ill. 499.

Wisconsin.—*Hunter v. Warner*, 1 Wis. 141.

Kentucky.—*Chism v. Woods*, Hard. 531; *Vaughn v. Hopson*, 10 Bush 337.

Tennessee.—*Bradshaw v. Thomas*, 7 Yerg. 497; *Gambling v. Read*, Meigs 281.

Minnesota.—*McClelland v. Nichols*, 24 Minn. 176.

Iowa.—*Bailey v. Harris*, 8 Iowa 331; *Robinson v. Chapline*, 9 Iowa 91; *Moseley v. Shattuck*, 43 Iowa 540.

Missouri.—*Parmlee v. Catherwood*, 36 Mo. 479; *Sumner v. Cottey*, 71 Mo. 121; *Wangler v. Franklin*, 70 Mo. 659.

Arkansas.—*Carroll v. Wiggins*, 30 Ark. 402.

Nebraska.—*Aultman v. Mallory*, 5 Neb. 178; *McCormick v. Stevenson*, Neb. Sup. Ct., 1882, 14 Reporter 691.

Kansas.—*Hallowell v. Milne*, 16 Kan. 65; *Fleck v. Warner*, 25 Kan. 492.

California.—*Putnam v. Lamphier*, 36 Cal. 151.

Nevada.—*Cardinal v. Edwards*, 5 Nev. 36.

Federal Courts.—*Gregory v. Morris*, 1 Wyom. T. 213, affirmed by United States Supreme Court, 96 U. S. 619; *Gaylor v. Dyer*, 5 Cranch C. C. 461; *Wood v. Brooke*, 2 Sawy. 576; *The Oriole*, 1 Sprague 31; *Rogers, &c., Co. v. Lewis*, 4 Dill. 158; *Bauendahl v. Horr*, 7 Blatchf. 548.

Ontario.—*Stevenson v. Rice*, 24 U. C. C. P. 245; *Gleason v. Knapp*, 26 Id. 553; *Mason v. Johnson*, 27 Id. 208; *Tufts v. Mottashed*, 29 Id. 539; *Walker v. Hyman*, 1 Ont. App. 345; *Mason v. Bickle*, 2 Id. 291; *Nordheimer v. Robinson*, 2 Id. 305.

93. *Blair v. Hamilton*, 48 Ind. 32; *Vincent v. Cornell*, 13 Pick. 294; *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255; *Currier v. Knapp*, 117 Mass. 324; *Chase v. Ingalls*, 122 Mass. 381. But see *Chase v. Ingalls*, 125 Mass. 117.

This is on the ground that such a buyer is in the position of a bailee, responsible for the goods to the owner, and therefore entitled to sue for them. ⁹⁴

The interest of the buyer, before default, may be levied on and sold for his debts, and the seller cannot maintain trover until after breach of the condition, if, by the terms of his agreement, he is not entitled to take the property until such breach. ⁹⁵

In *Newhall v. Kingsbury* ⁹⁶ a mowing-machine was sold and delivered, price payable in installments, machine to continue the seller's property until paid for. The sheriff seized and sold it for the buyer's debts, and the seller thereupon brought trover before the first installment became due. Morton, J., said that the first buyer had rightful possession until failure to perform the condition. "He had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions." ⁹⁷ "At the time the plaintiffs commenced this suit, there had been no breach of the condition, and they had no right of possession. It follows that the action was prematurely brought." But after breach of the condition of payment, the seller may take the property by replevin from the buyer's creditors, no matter how large a portion of the price may have been paid on account. ⁹⁸

The interest retained by the seller in goods bargained, and delivered on condition of payment, may also be sold, subject to the rights of the buyer in possession, either before or after default; ⁹⁹ it may also be levied upon and sold for the debts of the seller, or the seller may mortgage it. ¹⁰⁰

The seller's interest may be sold.

§ 427. The seller retaining title is the owner of the natural increase of the property, and may recover it if the condition is broken. Thus, in *Buckmaster v. Smith*, ¹⁰¹ the seller recovered in trover not only for a mare which he had sold

The natural increase follows the title.

⁹⁴ *Harrington v. King*, 121 Mass. 269. *Marvin*, 44 Vt. 277; *Hubbard v. Bliss*,

⁹⁵ *Fairbanks v. Phelps*, 22 Pick. 535. 12 Allen 590.

⁹⁶ 131 Mass. 445.

⁹⁷ Cites *Vincent v. Cornell*, Day v. Bassett and Currier v. Knapp, note 98, ante.

⁹⁸ *Hughes v. Kelly*, 40 Conn. 148; *Goodell v. Fairbrother*, 12 R. I. 233.

⁹⁹ See ante § 6, note 1; *Burnell v.*

¹⁰⁰ *McMillan v. Larned*, 41 Mich. 521, 523; *Everett v. Hall*, 67 Me. 497.

¹⁰¹ 22 Vt. 203. See, also, *Clark v. Hayward*, 51 Vt. 14; *Allen v. Delano*, 55 Me. 113; *Stewart v. Ball*, 33 Mo. 154; *Kellogg v. Lovely*, 46 Mich. 131.

on a condition, but also her colt produced while in the possession of the person who had contracted to purchase. On the other hand, the risk of loss of the property remains with the owner in the absence of any agreement to the contrary, though possession and use may be given to the buyer. Thus, in *Swallow v. Emery*,¹⁰² horses were sold at a stipulated price, to be kept and used by the buyer, but not to be his property until paid for. One of the horses died without fault of the buyer, and it was held that it was the seller's loss, and that he could only recover the price of the rest of the property sold, and that he could not reclaim the residue of the property after he had received its fair value.

The giving of a note for the whole price was considered by Grover, J., in *Ballard v. Burgett*,¹⁰³ to be evidence that the property was at the risk of the buyer, notwithstanding an agreement reserving title. But later cases hold that no recovery can be sustained on such note if the consideration fails.¹⁰⁴

§ 428. If the seller reserves title, and it is agreed that on default he may enter the buyer's premises and retake the property, this license is irrevocable, and the seller will not be liable for trespass for such entry. Thus in *Walsh v. Taylor*¹⁰⁵ furniture was delivered, part of the price being paid, and the title to the furniture reserved until the rest of the price should be paid in installments of \$1 per month. After default in payment of the entire balance, the seller entered the buyer's house and forcibly removed the furniture against the prohibition of the buyer. The court held that the license was irrevocable, and suit could not be maintained for trespass. But such entry must be made in a reasonable manner, and without needless violence.¹⁰⁶

§ 429. Whether, on a sale reserving title till the price is paid, partial payments are forfeited on default of the residue, is a question on which the cases conflict. In courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price, to retain only so much as will compensate him.

102. 111 Mass. 355. See *Grant v. 556*; *Kent v. Buck*, 45 Vt. 18. *United States*, 7 Wall. 331.

103. 40 N. Y. 314.

104. See cases stated *post* §§ 433, 434, 435. See, also, *Loring v. Loring*, 64 Me.

105. 39 Md. 592. See, also, *McClelland v. Nichols*, 24 Minn. 176.

106. *Drury v. Hervey*, 126 Mass. 519; *Churchill v. Hulbert*, 110 Mass. 42.

In *Massachusetts* the partial payments are forfeited. In *Angier v. Taunton Paper Co.*¹⁰⁷ a machine was delivered for \$1000, payable in ten monthly installments; title not to pass till paid for. The buyer defaulted after paying \$500, and mortgaged the machine. The seller brought trover against the mortgagee, and it was held that he could recover the entire value. This case was recently followed in *Colcord v. McDonald*.¹⁰⁸

In *Knox v. Perkins*¹⁰⁹ property was sold and notes were given for the price; and as to some of the property it was agreed the sale should be void if the notes were not paid when due. Default being made in payment, the seller retook the forfeited portion of the property, and also enforced the notes. Hoar, J., said: "It was in effect an agreement that R. & S. should have the whole property for a certain price, if the purchase money should be paid punctually; but that if it should not be so paid, they should have less property for the price. Such a contract was a lawful one, if the parties chose to make it. The vendor was entitled to the whole price agreed on."

§ 430. This subject received thorough consideration in *Brown v. Haynes*.¹¹⁰ In that case oxen were sold for \$120, of which one-half was paid in May; if the residue was not paid in September the seller could retake them; and they were to be the seller's until paid for. The final payment was not made, but the oxen were sold to one from whom the seller demanded them; and on refusal to give them up the seller brought trover against the last purchaser. It was argued for the defence that the seller had only a lien for \$60, and his recovery should be limited to that sum; but the court held that the seller had the entire property, and the measure of damages was the entire value of the cattle. Appleton, C. J., said: "The purchaser failing to perform his agreement, derives no benefit from a partial performance of his contract, nor can he confer any by reason thereof." But he intimated that an equitable suit might relieve the buyer. This case was followed in *Everett v. Hall*.¹¹¹ To the same effect see the recent *Mississippi* case of *Duke v. Shackelford*.¹¹²

*Fleck v. Warner*¹¹³ was an action of replevin by the seller against the buyer for a safe sold to be paid for in installments; title reserved.

107. 1 Gray 621.

108. 128 Mass. 470.

109. 15 Gray 529.

110. 52 Me. 578.

111. 67 Me. 497.

112. 56 Miss. 552.

113. 25 Kan. 492.

till paid for. Defendant argued that the seller must tender back payments received by him before he could recover; but the court said that such tender was not necessary to sustain replevin, and whether any part of the payments could be recovered must be determined in another action.

In *Haviland v. Johnson*,¹¹⁴ the buyer of a sewing machine on installments, having paid six out of twelve monthly installments, defaulted, and the machine was taken away from her. She sued to recover back the installments paid, but the court found no cause of action. The same conclusion was reached in Illinois in the case of *Singer Manufacturing Co. v. Treadway*.¹¹⁵

§ 431. In *Latham v. Sumner*,¹¹⁶ a piano sold was to vest only on payment of the price, of which \$60 was paid, and for the residue notes were given. On default of payment of the first note, the seller retook the piano, and returned the notes. The buyer sued to recover back the cash payment, on the ground that one who rescinds a contract must place the other party *in statu quo*. But the court said that there was no rescission, but an enforcement of the contract.

In *Howe Machine Co. v. Willie*,¹¹⁷ the buyer of a sewing machine on installments refused to complete payments because of defects in the machine. The seller retook the machine and the buyer sued for the installments paid. The suit was sustained on the ground that the buyer was warranted in rescinding because of the defects.

§ 432. *Whelan v. Couch*¹¹⁸ was a case where the fixtures in a bowling-alley were sold for \$1078, in installments—\$350 down, \$109 per month for three months and \$9 on the first day of each month thereafter till the whole was paid, time being made of the essence of the contract, and all payments to be forfeited in case of default. After more than half of the price had been paid, the buyer delayed one day in tendering payment, and the seller claimed a forfeiture. Spragge, C., said: "It shocks one, certainly, that a vendor should receive such considerable sums as W. has received and retain them as forfeited payments, because a sum so small as \$9 was not paid to the day; but that was the contract as explicit as the parties could make it, and I find no warrant for interfering with the contract under any circumstances that appear

114. 7 Daly 297.

115. 4 Brad. 57.

116. 89 Ill. 233.

117. 85 Ill. 333.

118. 26 Grant's Ch. (Ont.) 74.

in this case." The Chancellor did not discuss the question whether he might not refuse the aid of the court to enforce a forfeiture.

§ 433. On the other hand there are many decisions which adjust the claims of the parties on equitable principles. Equitable principles.

In *Preston v. Whitney*,¹¹⁹ a piano was sold on installments of \$25 per month, title reserved till paid for, and the seller was entitled to retake possession on any default. After \$100 had been paid, default was made and the piano was taken back. The buyer sued to recover back his payments. *Christiancy, J.*, said: "The defendant, having received one hundred dollars of plaintiff's money, paid only in consideration of the proposed purchase, and having taken back the property which constituted the consideration, and having terminated the contract upon which it was paid, has so much of the plaintiff's money in his hands, for which he should account upon just and equitable principles. He would doubtless have the right to deduct from the amount a fair compensation for the use of the piano, as well as for any reduction in value beyond that arising from its legitimate use, and for any incidental expense in regaining possession. But he would have no right, under the terms of this agreement, to claim any forfeiture of all the money which might have been paid, beyond such reasonable compensation; for, as to such excess, he has given and the plaintiff has received no equivalent or consideration. * * * Whether it would be competent to provide in such a contract for the forfeiture of all the several installments, or whether such a provision would be treated as a penalty, according to the principles which distinguish penalties from stipulated damages, is a question upon which we express no opinion."

§ 434. Subsequently, in the same state, in *Johnson v. Whittemore*,¹²⁰ the seller, on default of payment for a piano sold conditionally, brought trover against the buyer, and obtained judgment for its full value. But on writ of error this was reduced to the unpaid balance of the price, *Christiancy, C. J.*, remarking that the provision in the contract for retaining the money paid only applied in case the vendor declared the sale void and retook the property, under the terms of the agreement. "What might have been the effect of such a provision in case the contract had been declared void, we need not decide, though it is clear such a provision is not one which the law would enforce, as for stipu-

¹¹⁹. 23 Mich. 260, 267.

¹²⁰. 27 Mich. 463, 470. See *Shepard v. Cross*, 33 Mich. 96, stated *post* § 436.

lated damages, as it is not based upon any idea of just and adequate compensation."

In *Hine v. Roberts*,¹²¹ an organ was delivered under an agreement acknowledging the payment of \$50 "rent," and setting forth that a note for \$140 had been given for the rest of the "rent;" if all paid when due, a bill of sale should be given to the buyer; if not paid, the seller might retake the organ. Default was made and the organ retaken by the seller, who also brought suit on the note. Carpenter, J., said that the document was not a hiring but a conditional sale. "The purchase failed. There was therefore an entire failure of the consideration for the note." Therefore a verdict for the amount of the note was set aside. The same ruling was made in two recent Minnesota cases.¹²²

§ 435. In *Guilford v. McKinley*,¹²³ in an action of trover for a piano, delivered under a like contract, the court held that the seller could recover only a sum equal to the residue of the price, and that the buyer might reduce those damages by proof of breach of warranty.

In *Mott v. Havana National Bank*,¹²⁴ an engine was sold and a note given for the price, the engine to remain the property of the seller until the note was paid. The note not being paid, the engine was taken back. It was held that the amount recoverable on the note was the face of it, less the value of the engine when returned to the seller.

In *Ketchum v. Brennan*,¹²⁵ machinery was delivered, to be paid for in installments, title retained by the seller until paid. The buyer sold the property and made default. It was held that the seller could maintain replevin against the second purchaser only on condition that he tendered back to the first purchaser the partial payments received. In the contract in this case there was no express provision for return of possession or forfeiture of payments on default, and the case was discussed as one of rescission.

§ 436. If the seller, retaining title to property delivered on a conditional sale, permits the buyer to retain possession and receives payments after the default, this operates as a

Waiver of forfeiture.

121. 48 Conn. 267.

122. *Third National Bank of Syracuse v. Armstrong*, 25 Minn. 530, and *Minneapolis, &c., Co. v. Hally*, 27 Id. 495. See

Gleason v. Knapp, 26 U. C. C. P. 553.

123. 61 Ga. 230.

124. 22 Hun 354.

125. 53 Minn. 596.

waiver of the forfeiture, and the buyer, by making tender of the residue of the price, will become the owner of the property. ¹²⁶

In *Shepard v. Cross*, ¹²⁷ the seller retook by replevin a piano sold conditionally, after default of the last of many installments, and resold it. The buyer tendered the residue of the price and then brought replevin against the last purchaser, and it was sustained. The court said that mere neglect to pay on the day named would not forfeit the buyer's right, and that if such right of forfeiture existed the jury might infer a waiver, because the seller sought to collect the money afterward.

SECTION IV.—THIRD RULE—RIGHTS OF PURCHASERS AND CREDITORS.

§ 437. In the last chapter some cases were collected relative to the rights of a *bona fide* purchaser for value from a buyer in possession, under a conditional *delivery*. The following are cases where the *sale* was conditional, though as most of the decisions ignore the distinction, a perfect classification is not to be expected. The following decisions sustain the seller's title against creditors and purchasers from the buyer.

Rights of a *bona fide* purchaser from, or a creditor of a buyer in possession under a conditional sale.

Decisions sustaining the seller's title.

Ballard v. Burgett, ¹²⁸ is a case which has been often cited and followed on this point. Oxen were delivered under an agreement for sale; but it was part of the agreement that they should remain the property of the seller until paid for. The buyer sold them to a *bona fide* purchaser, against whom the original seller brought an action of replevin. Grover, J., said: "The possession of the contemplated purchaser gives him no better opportunity to impose upon purchasers, than that of an ordinary bailee. In the latter case, it has never been claimed that any title would be acquired by a purchaser from such bailee. Possession by a vendor, without title, has never been held sufficient to confer a title upon a purchaser from him. If neither of these facts, separately considered, will enable a vendor to confer title, I am unable to see how such result can be produced by

New York.

126. *Hutchings v. Munger*, 41 N. Y. Hamilton, 48 Ind. 32. But see, *contra*, 155; *Cushman v. Jewell*, 7 Hun 525, 529; *Hegler v. Eddy*, 53 Cal. 597.
Taylor v. Finley, 48 Vt. 78; *Blair v.* 127. 33 Mich. 96.
 128. 40 N. Y. 314.

uniting them in a vendor. * * * In *Herring v. Hoppock*¹²⁹ it was determined by this court that one who has bargained for the purchase of a chattel, and agreed to pay therefor at a future day, and has received a delivery under an agreement that no title should vest in him until payment, acquired no title; and that a creditor of such person, who had levied an execution thereon, was liable to the owner for the conversion of the chattel. This would be decisive of the present case, unless it be held that chattels so delivered are to be placed upon the same ground as commercial paper, in respect to purchasers. My conclusion, both upon principle and authority, is that the purchaser acquired no title."¹³⁰

§ 438. The same conclusion was reached in an earlier case in Massachusetts, *Coggill v. Hartford & N. H. R. R. Co.*¹³¹ *Bigelow, J.*, said: "The vendee in such cases, having no right to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. * * * There is no good reason or equity in placing the burden of a fraudulent sale by a vendee, in violation of the condition on which he received the property, upon a *bona fide* vendor, rather than upon a *bona fide* purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire, and see that his vendor has a good title to the property which he undertakes to sell." This is the Massachusetts case usually cited on this subject, and has been often followed in that state and elsewhere.¹³²

§ 439. In *Sumner v. Cottey*¹³³ an organ was leased for ten months, with the privilege to the lessee of purchasing the same at any time during that term for \$165, the rent paid to be credited on the price. The lessee sold the organ to a *bona fide* purchaser, against whom the lessor brought trover, which was sustained. *Henry, J.*, said: "That a conditional sale of personal property with

129. 15 N. Y. 409.

130. See *Austin v. Dye*, 46 N. Y. 500.

131. 3 Gray 545, 548.

132. See cases cited in note 146. That

such an agreement is not a mortgage was decided in Maine, in *Bryant v. Crosby*, 36 Me. 562.

133. 71 Mo. 121, 125.

delivery of possession to the vendee, the vendor reserving the title to the property until paid for, does not invest the vendee with a title which enables him to sell it even to a *bona fide* purchaser without notice of the agreement between the vendor and vendee, and although no writing evidencing such agreement be recorded, has been so often declared by this court, that it must be regarded as finally settled in this state." 134

§ 440. In Iowa the law was the same until 1872, when a statute was passed providing that no sale or lease, wherein the transfer of title of personal property is made to depend ^{Iowa decisions.} upon any condition, shall be valid as to creditors and purchasers, unless recorded as a chattel mortgage. The cases cited in the note illustrate the law as to contracts made prior to the statute. 135

For decisions upon contracts made since the statute was passed, see *infra*, § 461.

§ 441. *Bradshaw v. Warner*, 136 is a case of sale of a safe, "title not to pass until notes are paid, or safe paid for in cash." The safe was levied on for the buyer's debt and sold to a *bona fide* purchaser, against whom the original seller brought replevin. ^{Indiana decisions.} Worden, C. J., said: "We see nothing in the case that takes it out of the ordinary rule. As a general rule, the purchaser of personal property on execution acquires no better right than the execution defendant had."

Bradshaw v. Warner was followed by the same court in *Hodson v. Warner*. 137 That such sales are not to be considered as chattel mortgages was decided in *Plummer v. Shirley*. 138

§ 442. In *Forbes v. Marsh*, 139 a stage coach was delivered to the buyer under an executory contract of sale, with an agreement that meanwhile he might use it. It was seized ^{Connecticut decisions.} under execution against the buyer and sold, and the seller brought trover and the suit was sustained. Williams, C. J., said: "The vendee comes into possession of property which was known to belong

134. See cases collected in note 146. *enbaugh*, 40 Iowa 114; *Moseley v. Shattuck*, 43 Iowa 540.
In *Wangler v. Franklin*, 70 Mo. 659, it is expressly decided that such contract is valid under the Missouri statutes without recording. But see, *contra*, *Heryford v. Davis*, 102 U. S. 235, stated *infra*, § 455.

135. *Bailey v. Harris*, 8 Iowa 331; *Robinson v. Chapline*, 9 Iowa 91; *Baker v. Hall*, 15 Iowa 277; *Knowlton v. Red-*
136. 54 Ind. 58, 62. Cites *Thomas v. Winters*, 12 Ind. 322, and *Ballard v. Burgett*, ante § 437, and *Hirschorn v. Canney*, ante § 341.
137. 60 Ind. 214.
138. 16 Ind. 380.
139. 15 Conn. 384, 398.

to another man. Whether, therefore, the vendee had borrowed it, or hired it, or purchased it, became a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance." This case was followed in cases where the buyer in possession sold to a *bona fide* purchaser.¹⁴⁰

In *Bigelow v. Huntley*,¹⁴¹ horses delivered to the buyer were attached by his creditor, against whom the seller brought trover. Phelps, J., said: "The sale of the horses was conditional. This being the case, the general property never passed. These sales are frequent, and it has always been considered that payment of the stipulated price was a condition precedent."

§ 443. In *Cole v. Berry*,¹⁴² the question received full consideration. The sale was of a sewing machine, payable in installments of \$5 per month, for which the buyer gave his note, the machine to remain the property of the seller till paid for. It was seized by a constable under an execution against the buyer, and the seller brought trover against the officer who made the levy. The suit was sustained. The court cited and followed the very similar case of *Herring v. Hoppock*, *supra*. The court also considered the rights of *bona fide* purchasers from the buyer in possession under a conditional sale, approved *Ballard v. Burgett*, *ante* § 437, and disapproved the Pennsylvania cases below stated. Depue, J., said (p. 315): "From the hypothesis that, *inter partes*, no title passes to the vendee, under a contract of sale which is conditional as to the transfer of title, until the condition is performed, the only deduction that can rationally be made is that, in such a transaction, the title of the vendor must also prevail over the rights of the creditors or a purchaser from the vendee, whose rights cannot rise higher than the source from which they are derived, unless they can show a title superior to that of the vendee whom they represent, arising from some conduct of the vendor, which the law denominates as fraudulent. Possession is evidence of title, but is not title, and in this state possession by a party, not in accordance with the actual state of the title, is not, *per se*, fraudulent."

§ 444. *Sanders v. Keber*¹⁴³ also contains a full discussion of the subject. The court refuses to follow the decisions in Illinois, but quotes and adopts *Coggill v. Hartford & N. H. R. R.*, *ante* § 438, as correctly expressing the law

140. See cases cited in note 146, *post*.

141. 8 Vt. 151, 154.

142. 42 N. J. L. 308, 313.

143. 28 Ohio St. 630.

In *Woods v. Burrough*,¹⁴⁴ a sale was made of slaves, reserving a lien for the price. The court distinguished this case from *Gambling v. Reed*, Meigs 281, where the entire property was reserved, and held that the lien was void, because not in writing and registered, as against a purchaser from the buyer.

Tennessee decisions.

In *Planters' Bank v. Vandyck*,¹⁴⁵ slaves were delivered in consideration of an agreement of the buyer to pay a certain debt of the seller, title not to pass until the debt should be paid. The slaves were emancipated soon after, and on suit for the price the buyer set up failure of consideration, title never having vested in him. But the court held that her interest in the goods was a mere lien, and that she had the title and the risk of the property.

In most of the other states the courts have adopted the rule stated in most of the foregoing cases, strictly enforcing the maxim, *nemo dat quod non habet*, and holding that merely giving possession without title confers no authority to sell. See cases cited in note.¹⁴⁶

Most of the states accord with above decisions.

144. 2 Head 202.

145. 4 Heisk. 617. See cases in note 146.

146. *Maine*.—*Tibbetts v. Towle*, 12 Me. 341; *Brown v. Haynes*, 52 Me. 578; *Everett v. Hall*, 67 Me. 497; *Bryant v. Crosby*, 36 Me. 562; *Hotchkiss v. Hunt*, 49 Me. 213.

New Hampshire.—*Sargent v. Gile*, 8 N. H. 325; *Haven v. Emery*, 38 N. H. 66; *Kimball v. Jackman*, 42 N. H. 242; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446.

Vermont.—*Clark v. Wells*, 45 Vt. 4; *Duncan v. Stone*, 45 Vt. 118.

Massachusetts.—*Sargent v. Metcalf*, 5 Gray 306; *Blanchard v. Child*, 7 Gray 155; *Hubbard v. Bliss*, 12 Allen 590; *Hirschorn v. Canney*, 98 Mass. 149; *Carter v. Kingman*, 103 Mass. 517; *Zuchtman v. Roberts*, 109 Mass. 53; *Benner v. Puffer*, 114 Mass. 376.

Rhode Island.—*Goodell v. Fairbrother*, 12 R. I. 233.

Connecticut.—*Hart v. Carpenter*, 24 Conn. 427; *Tomlinson v. Roberts*, 25 Conn. 477; *Cragin v. Coe*, 29 Conn. 51; *Hughes v. Kelly*, 40 Conn. 148; *Lucas v. Birdsey*, 41 Conn. 357; *Brown v. Fitch*,

43 Conn. 512; *Lewis v. McCabe*, Conn. Sup. Ct. of Errors, 1882.

New York.—*Austin v. Dye*, 46 N. Y. 500; *Cole v. Mann*, 8 N. Y. Sup. Ct. 380, affirmed on appeal, 62 N. Y. 1. But see post § 460 for conflicting cases.

New Jersey.—*Cole v. Berry*, 42 N. J. L. 308, 313.

Pennsylvania.—See post § 446.

Delaware.—*Williams v. Conoway*, 3 Houst. 63.

North Carolina.—*Clayton v. Heister*, 80 N. C. 275, and cases there cited.

South Carolina.—See post § 459.

Georgia.—*Goodwin v. May*, 23 Ga. 205; *Jowers v. Blandy*, 58 Ga. 379; *Guilford v. McKinley*, 61 Ga. 230.

Alabama.—See post § 447.

Mississippi.—*Ketchum v. Brennan*, 53 Miss. 596, 608; *Duke v. Shackelford*, 56 Miss. 552.

Texas.—*Case v. Jennings*, 17 Tex. 661.

Ohio.—*Sage v. Slentz*, 23 Ohio St. 8; *Sanders v. Keber*, 28 Ohio St. 630; *Carmack v. Gordon*, 2 Cinn. Super. Ct. 408.

Indiana.—*Thomas v. Winters*, 12 Ind. 322; *Hanway v. Wallace*, 18 Ind. 377; *Dunbar v. Rawles*, 28 Ind. 225; *Brad-*

§ 445. In the Province of Ontario the law is the same as in above-stated cases. In *Walker v. Hyman*¹⁴⁷ a safe was delivered by a manufacturer and notes taken for the price, title not to pass until notes were paid, or safe paid for in cash. The buyer sold it to a *bona fide* purchaser, against whom the safe-maker brought trover. It was held that title remained in the seller, and he was not estopped by having painted the buyer's name on the safe. This case was followed in *Mason v. Bickle*, and in *Nordheimer v. Robinson*.¹⁴⁸

§ 446. In Pennsylvania a distinction is made between possession under a hiring with the privilege of purchasing, and possession under a conditional contract of sale. The former is valid as to creditors and purchasers. The latter is void as to them. We will consider the first class here.

In *Chamberlain v. Smith*¹⁴⁹ oxen were delivered to a farmer to keep and use for one year, with the privilege of purchase at a fixed price at the end of the year. This was held a bailment, and the owner's replevin suit against a *bona fide* purchaser from the bailee was sustained. This decision would be recognized as law in every state,

shaw v. Warner, 54 Ind. 58, 62; *Hodson v. Warner*, 60 Ind. 214.

Illinois.—See *post* § 458.

Michigan.—*Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158; *Whitney v. McConnell*, 29 Mich. 12; *Marquette Manufacturing Co. v. Jeffery*, Mich. Sup. Ct., Oct., 1882.

Wisconsin.—See § 461, *post*.

Kentucky.—*Patton v. McCane*, 15 B. Mon. 555. Overruled in *Vaughn v. Hopson*, 10 Bush 337. See *post* § 457.

Tennessee.—*Gambling v. Read*, Meigs 281; *Bradshaw v. Thomas*, 7 Yerg. 497; *Price v. Jones*, 3 Head 84; *Holmark v. Mollin*, 3 Coldw. 482. See *ante* § 444.

Iowa.—See *ante* note 135, and see *post* § 461.

Missouri.—*Parmlee v. Catherwood*, 36 Mo. 479; *Little v. Page*, 44 Mo. 412; *Griffin v. Pugh*, 44 Mo. 326; *Ridgeway v. Kennedy*, 52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659; *Sumner v. Cottey*, 71 Mo. 121, 125, stated *ante* § 439. See, also, *Rogers Locomotive Works v. Lewis*, 4

Dill. 158, and, *contra*, *Heryford v. Davis*, 102 U. S. 235, stated *post* § 455.

Arkansas.—*Carroll v. Wiggins*, 30 Ark. 402.

Nebraska.—*Aultman v. Mallory*, 5 Neb. 178.

Kansas.—*Sumner v. McFarland*, 15 Kan. 600; *Hallowell v. Milne*, 16 Kan. 65; *Owens v. Hastings*, 18 Kan. 446; *Hall v. Draper*, 20 Kan. 137.

California.—*Wright v. Salomon*, 19 Cal. 64; *Kohler v. Hayes*, 41 Cal. 455.

Nevada.—*Cardinal v. Edwards*, 5 Nev. 36.

Oregon.—*Singer Co. v. Graham*, 8 Oreg. 19.

147. 1 Ont. App. 345.

148. 2 Ont. App. 291, Id. 305. See, also, *Tufts v. Mottashed*, 29 U. C. C. P. 539; *Black v. Drouillard*, 28 Id. 107; *Stevenson v. Rice*, 24 Id. 245. See, also, *New Brunswick Railway Co. v. McLeod*, 1 P. & B. 257.

149. 44 Penna. 431.

for the bailee did not bind himself to purchase. The transaction was not a mortgage, for there was no debt.

In *Rowe v. Sharp* ¹⁵⁰ the seller rented two billiard tables for nine months, at a certain rent, to be surrendered to the lessor at the end of the term, whereupon the lessor was to execute to the lessee a bill of sale in consideration of the sum paid for rent. This was sustained against a purchaser from the lessee as a "bailment for use," on the authority of *Clark v. Jack*. ¹⁵¹ *Rowe v. Sharp* was followed in *Henry v. Patterson*, ¹⁵² and in *Becker v. Smith*. ¹⁵³

In *Crist v. Kleber* ¹⁵⁴ a piano was rented for \$35 per quarter, with the option to the lessee to buy the piano for \$450 in nine months, deducting the rent, in case of such purchase, from the price. This was held valid against a purchaser of the piano at a sale for the buyer's taxes.

The case of *Enlow v. Klein* ¹⁵⁵ goes farther than any other in Pennsylvania in sustaining a conditional sale in the form of a bailment for hire. The seller agreed to furnish the buyer a team and wagon and other gear, for country peddling, for \$5 per week, to be paid for two hundred weeks, at the end of which time the buyer should have the title. The buyer agreed to keep up repairs, and if a horse should die, replace it. Meanwhile title should be in the seller. The seller testified that \$2 per week was for the use, and \$3 for the price of the horses. The court sustained the title of the seller against a creditor of the buyer, quoting *Rose v. Story* ¹⁵⁶ to this effect: "Where, by a contract, the vendee receives a chattel which he is to keep for a certain period, and if in that time he pays for it the stipulated price, he is to become the owner, but if he does not pay the price, he is to pay for its use, the vendee receives it as bailee, and the right of property is not changed until the price is paid." It will be observed that in *Enlow v. Klein* there was an obligation on the part of the buyer to pay the installments, and that the property was at his risk. The decision is explained in *Stadtfeld v. Huntsman* ¹⁵⁷ by Paxson, J., who says it is a close case. "An examination of the facts shows that it was a case of hiring, that \$2 per week of the sum to be paid was for the use or hire of the horses. This was an important feature of the case in our consultation, and is referred to now that it

150. 51 Penna. 26, 30.

151. 7 Watts 375.

152. 57 Penna. 346, 352.

153. 59 Penna. 469, 473.

154. 79 Penna. 290.

155. 79 Penna. 483.

156. 1 Penna. St. 190.

157. 92 Penna. 53, 57.

may not be misunderstood hereafter. *Enlow v. Klein* was justified by the authorities, and we do not propose to disturb it. But we will not take one step beyond it. We stop just where it ends."

§ 447. In Alabama the Pennsylvania decisions have been closely followed. In *McCall v. Prescott* ¹⁵⁸ *Brickell, C. J.*, states the case as follows: "A landlord purchased two mules and turned them over to a tenant to cultivate crops on the rented premises, promising the tenant that he would sell the mules to him when he was able to purchase them. * * * The transaction was a mere bailment, with a privilege of purchasing, which the tenant could exercise or not at his option." Cites *Chamberlain v. Smith, supra*, § 446, and *Martin v. Matthiot*. ¹⁵⁹ The Pennsylvania and Alabama cases, holding that in the absence of a bailment a sale reserving title is void as to third parties, are stated in this chapter, *post* §§ 458, 459.

§ 448. *In what Cases the Seller may be Estopped from Claiming Title.*—The seller may be estopped from claiming title, as against a *bona fide* purchaser from the buyer in possession, by giving the buyer evidence of title or authority to sell. There is no dispute as to this principle, but a wide variance in the application of it, some courts regarding the giving of possession to a proposed buyer an estoppel. We have already seen that under the factor's acts of many of the states, in some cases, giving possession of goods may confer power to sell. See *ante* §§ 19, 20, 21 and notes. In addition to these statutes, it has often been held that one who entrusts another with property to sell cannot dispute the title of purchasers.

Thus in *Fitzgerald v. Fuller*, ¹⁶⁰ twenty wagons were delivered to the buyer, to be returned to the seller within thirty days unless paid for. The purpose of the transaction was that the buyer might sell the wagons. One of the number was sold, but the original seller, not being paid, brought trover against the *bona fide* purchaser in possession. *Bockes, J.*, distinguished *Ballard v. Burgett*, above stated, § 437, and said: "If a man, owning property, delivers it to a third person and sends him forth to sell it, and to receive pay for it, no secret agreement between them can affect the title acquired by a purchaser who buys in good faith, without notice of their agreement."

§ 449. An admirable discussion of this subject will be found in

^{158.} 64 Ala. 254, 258.

^{160.} 19 Hun 180.

^{159.} 14 S. & R. 214.

*Leigh v. Mobile and Ohio R. R.*¹⁶¹ After stating the general maxim, *nemo dat quod non habet*, the court recognizes three exceptions in favor of *bona fide* purchasers. The first comes within the class discussed *post* § 432, *et seq.* The second applies to transfers with intent to pass title, but which have been induced by fraud. These are valid if the goods come into the hands of a *bona fide* purchaser. See *post* Book III., Chap. II., § 2, "Fraud on the Vendor." The third class is defined as follows by Brickell, J.: "Another class of cases forming an exception to the general rule is, when the owner, by his own act or consent, has given another such evidence of the right to sell or otherwise dispose of his goods as, according to the customs of trade or the common understanding of the world, usually accompanied the authority of sale or disposition. Then if the person intrusted with the possession of the goods, and with the *indicia* of ownership, or of authority to sell or otherwise dispose of them, in violation of his duty to the owner sells to an innocent purchaser, the sale will prevail against the right of the owner. * * * A case does not fall within this exception unless the owner confers on the vendor other evidence of ownership, or of authority to dispose of the goods, than mere possession."¹⁶² In every case it devolves on the owner who has parted with possession, reserving title till payment, to prove, as against a third party, that the condition has not been waived or satisfied.¹⁶³

§ 450. In *McNeil v. Tenth National Bank*,¹⁶⁴ Rapallo, J., quoted from Denio, J., in *Covill v. Hill*,¹⁶⁵ as follows: "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give good title." Commenting on this, Rapallo, J., said: "But if the owner entrusts to another not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different." Accordingly, a *bona fide* purchase of shares of stock from one who held a blank assignment of

161. 58 Ala. 165, 176.

162. See *McMahon v. Sloan*, 12 Penna. 229, 233; *Pickering v. Busk*, 15 East 38; *Rogers v. Whitehouse*, 71 Me. 222; *Brinton v. Gerry*, 7 Bradw. 238, 245; *Dows v. Nat. Exchange Bank*, 91 U. S. 618. See, also, *Comer v. Cunningham*, 77 N. Y. 391, and *Dows v. Kidder*, 84 N. Y. 121,

128, stated *ante* § 317, note 2; *Carmack v. Gordon*, 2 Cinn. 408; *Case v. Jennings*, 17 Tex. 661.

163. *Goodell v. Fairbrother*, 12 R. L. 233; *Leighton v. Stevens*, 19 Me. 154.

164. 46 N. Y. 325, 330.

165. 4 Den. 323.

stock was held valid, though in fraud of the rights of the assignor. In *Weaver v. Borden*,¹⁶⁶ Allen, J., said: "If the rightful owner has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing upon the faith of such apparent ownership and *jus disponendi*." But in this case it was held that the purchaser was not a *bona fide* purchaser for value, because he took the property for a precedent debt.

The case of *McNeil v. Tenth National Bank* will be found cited in the reports of almost every state, relative to sales of choses in action; but the principle is applicable to cases where evidence of title to chattels or authority to sell them is given together with the possession.

As to the effect of laches in estopping the owner of chattels conditionally sold or delivered from setting up title against a *bona fide* purchaser from the buyer in possession, see *ante* § 351, *et seq.*¹⁶⁷

§ 451. But this principle of estoppel is in most cases on the ground of agency. Therefore, a creditor of one who has the property of another in his hands, with power to sell it, cannot take such property by execution for the debt.¹⁶⁸

Thus, in *Lewis v. McCabe*, Connecticut Court of Errors, 1882, (Am. Law Reg., April, 1882,) several barrels of liquor were sold to a retail dealer, on credit, title reserved to the seller till paid for, but the buyer to have leave to sell at retail. The buyer commenced to retail the liquor, but before he made any payment it was attached for his debts by a creditor against whom the seller brought replevin. Loomis, J., cites *Rogers v. Whitehouse*,¹⁶⁸ *Armington v. Houston*,¹⁶⁹ and *Burbank v. Crooker*,¹⁷⁰ the first two in support of the proposition that such an arrangement is valid against the buyer's creditors, and the last that it is valid against one to whom the buyer sells the whole stock, though of course not against buyers at retail. Justice Loomis continues: "Possession with the *jus disponendi* added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent, without regard to the real intent of the parties. Bump on Fraud. Conv. 123, and cases cited. We concede

¹⁶⁶. 49 N. Y. 286, 288.

¹⁶⁷. See, also, *Robbins v. Phillips*, 68 Mo. 100, and *Calais Steamboat Co. v. Van Pelt*, 2 Black 372, stated *post* § 451.

¹⁶⁸. *Cole v. Mann*, 62 N. Y. 1; *Nash v. Weaver*, 23 Hun 513; *Becker v. Smith*,

59 Penna. 469; *Rogers v. Whitehouse*, 71 Me. 222. See, *contra*, *Ludden v. Hazen*, 31 Barb. 650.

¹⁶⁹. 38 Vt. 448.

¹⁷⁰. 7 Gray 158.

Purchasers
protected, but
not creditors.

that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions." The Connecticut decisions are above cited in note 146.

In *Calais Steamboat Co. v. Van Pelt*,¹⁷¹ a ship was built under the supervision of an agent, and in the name of the agent, who sold it. *Held*, that the owners who had permitted the agent to use his own name in building were estopped from denying his right to sell.

§ 452. Since the enactment in most of the states of acts rendering chattel mortgages void against the creditors of or *bona fide* purchasers from the mortgagor, unless filed or recorded, many decisions have been made holding conditional contracts of the class now under consideration to be chattel mortgages. This opinion is gaining ground, having been lately adopted by the United States Supreme Court.

Decisions that conditional sales are void as to creditors or purchasers without notice.

In *Herring v. Hoppock*,¹⁷² Comstock, J., said of a sale reserving title until a note for the price should be paid: "If the question had never been decided, it might, perhaps, be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage. It is impossible, however, to distinguish the case from those cited, and we ought not to disturb the rule which has been established."

§ 453. In Illinois the leading case is *Brundage v. Camp*,¹⁷³ stated in the last chapter, *ante* § 361. This was a case of conditional delivery; but the reasoning of the court applies ^{Ill. note.} also to cases of conditional sales.

In *Murch v. Wright*,¹⁷⁴ the subject of sale was a piano, leased for fourteen months at \$50 per month; if paid, to be allowed in payment of the price, which was \$700. A creditor of the buyer levied upon the piano before the term had ended, whereupon the seller replevied. Lawrence, J., said: "It was a mere subterfuge to call this transaction a lease, and the application of that term in the written agreement between the parties does not change its real character. It was a conditional sale, with a right of rescission on the part of the vendor in case the purchaser should fail in payment of his installments—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of losing his lien, in case the property should be levied upon by creditors of the purchaser while in possession

171. 2 Black 372.

172. 15 N. Y. 409, 414.

173. 21 Ill. 330.

174. 46 Ill. 487.

of the latter. That has happened in this instance, and the lien relied upon by the appellant is unavailing as against a creditor." Cites *Brundage v. Camp*, *supra*.¹⁷⁵

§ 454. The United States Supreme Court has fully adopted the Illinois rule of law, basing this conclusion upon the chattel mortgage acts and on the policy of discouraging secret liens. In *Hervey v. R. I. Locomotive Works*¹⁷⁶ a locomotive was "leased" for \$12,093. For the "rent" ten per cent. was paid in cash, and for the residue three notes were given, payable in six, nine and twelve months; and it was agreed that on payment of all the notes the lessor would transfer the locomotive to the lessee. The locomotive was levied upon by a creditor, whereupon the lessor brought replevin, which was sustained in the Circuit Court; but the Supreme Court reversed the judgment, on the authority of the decisions in Illinois which were held to control the contract. *Murch v. Wright*, *supra*, is said to be like the case at bar in all essential particulars, and is followed. Davis, J., said: "Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors. * * * The plaintiff cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien."¹⁷⁷

The Illinois statute provides that a conveyance of personal property having the effect of a mortgage or lien, shall be deemed a chattel mortgage, and shall be void as to any third person, unless recorded. This accords substantially with the chattel mortgage acts of the other states, and the conclusion of the Supreme Court, if generally adopted, will change the law on this subject in nearly every state.

§ 455. For instance, we have seen, *supra*, § 439, that the Missouri courts sustain conditional sales and leases as valid, without recording. But a Missouri contract of this class came before the United States Supreme Court in the case of *Heryford v. Davis*.¹⁷⁸ The agreement was in substance like that construed as a mortgage in *Hervey v. R. I. Locomotive Works*, *supra*, and the court came to the same conclusion as in that case, notwithstanding the decisions in Missouri to the con-

175. See *Lucas v. Campbell*, 88 Ill. 447; *McCormick v. Hadden*, 37 Ill. 370; *Van Duzor v. Allen*, 90 Ill. 499.

177. See *Fosdick v. Schall*, 99 U. S. 235, 250.

178. 102 U. S. 235, 243.

176. 93 U. S. 664, 672.

trary. See this case quoted *ante* page 11. The Missouri statute simply provides that "no mortgage or deed of trust of personal property shall be valid," &c., unless recorded.

§ 456. There is, however, a qualifying statement in *Heryford v. Davis* which should not be overlooked. Justice Strong, said: "If the contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company." This language is considered in *Hart v. Barney, &c., Co.*,¹⁷⁹ and Barr, J., said: "This language, read by itself, would be misleading. It should be read in connection with other parts of the opinion, and when that is done, it will be seen that the court means by "only a conditional sale," one that is really a conditional sale both to the buyer and seller; that is, the payment of the purchase money, as well as the passing of the title, is conditional. If, by the terms of the agreement, the purchaser becomes liable unconditionally for the purchase price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the registration statute, as its purpose is simply to retain a secret lien." In other words, in order to make a mortgage, there must be a debt. See *ante* pages 8 and 9.

§ 457. This case of *Hart v. Barney* arose under the Kentucky statute, which is almost precisely like the Missouri statute above stated. The contract was for the sale of cars de-^{Kentucky.} livered, for which notes were given; but title was not to pass until the notes were paid. On default the cars might be sold and the proceeds applied to pay the notes, which should continue binding for the balance due. This was held to be a mortgage, and void as to creditors because not recorded. In support of this decision the learned justice cited not only the case of *Heryford v. Davis*, *supra*, but also two Kentucky cases. In one of these, *Vaughn v. Hopson*,¹⁸⁰ a note was given for the price of a mule; and a clause was added to the note that the title remained in the seller until he should get his money. It was held chiefly on the authority of the very similar case of *Wait v. Green*,¹⁸¹ that a *bona fide* purchaser from the buyer in possession obtained good title; and *Patton v. McCane*¹⁸² was overruled.

179. 7 Fed. Reporter 543, 552.

180. 10 Bush 337.

181. 36 N. Y. 556. See *post* § 460.

182. 15 B. Mon. 555.

Greer v. Church ¹⁸³ was a case where a piano was rented for a fixed term, the lessee being bound to pay the rent, and the rent (\$400 for the first month) to be allowed on the price. A *bona fide* purchaser from the lessee was held to have obtained good title against the lessor. In *Hart v. Barney*, *supra*, Barr, J., referred to a decision not yet reported of the Kentucky Court of Appeals to the effect that a contract of renting a chattel, giving the lessee the *privilege* of purchase, will be valid, and the lessee cannot pass title to a *bona fide* purchaser. This decision (not named) probably turns on the fact that the lessee had an option to purchase, but was not bound to do so. There was no *debt* which the title was retained to secure, and therefore no mortgage. ¹⁸⁴

§ 458. We have already seen that in Pennsylvania a leasing of a chattel with the privilege of purchase, and also a leasing ^{Pennsylvania.} with the *obligation* to purchase, has been held a bailment, even though the rent was to be credited on the price. ¹⁸⁵ But in the absence of a contract of lending or hiring, the law is stated in *Stadtfeld v. Huntsman* ¹⁸⁶ as follows: "It has long been an established rule in Pennsylvania that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money is paid, is fraudulent and void as to the creditors of the vendee and innocent purchasers." The sale in this case was of furniture, delivered under a written agreement, the buyer to pay \$5 per week until the price should be paid, and the title to remain in the seller until payment in full. The buyer sold to one who took the goods without notice, against whom the first seller brought replevin. The court collected and distinguished the Pennsylvania cases of bailment stated in this chapter *supra*, § 446, and said: "The force of the argument for the plaintiff was spent in showing that a case of bailment is not within the rule laid down for conditional sales. The principle is conceded, but it has failed in showing the existence of a bailment. On the contrary it was a sale, and comes directly within the ruling of *Clow v. Woods*, 5 S. & R. 275; *Babb v. Clemson*, 10 Id. 419; *Martin v. Mathiot*, 14 Id. 214; *Jenkins v. Eichelberger*, 4 Watts 121; *Rose v. Story*, 1 Penna. St. 190; *Mitchell v. Commonwealth*, 37 Penna. 187; *Waldron v. Haupt*, 52 Penna. 408; *Haak v. Lindermann*, 64 Penna. 499, and similar cases." ¹⁸⁷

183. 13 Bush 430.

184. *Ante* pp. 8 and 9.

185. *Ante* § 446.

186. 92 Penna. 53, 55.

187. See, also, *Wylie's Appeal*, 90 Penna. 210, 216. Of these cases, *Martin v. Mathiot* is the one principally cited.

In the recent Pennsylvania case of *Brunswick v. Hoover*,¹⁸⁸ a lease with a provision that the rent paid should be credited on the price, was held to be in fact a sale, the form of a lease being called a "thin disguise." This, if followed, will harmonize the law of Pennsylvania with that of Illinois and the Federal courts.

§ 459. The law in Alabama was settled in the cases of *Sumner v. Woods* and *Dudley v. Abner*, after a full discussion.¹⁸⁹ The sale in *Dudley v. Abner* was of a mule, delivered to ^{Alabama.} the buyer, to remain the owner's property till paid for. The property came to the hands of a *bona fide* purchaser, against whom the owner brought trover. Manning, J., thought that the transaction should be regarded as a parol chattel mortgage, and void as against a *bona fide* purchaser, within the policy of the chattel mortgage acts, but the other members of the court concurred in a judgment for defendant on common law principles, without reference to the registration laws, following *Martin v. Mathiot*.¹⁹⁰

In *Leigh v. Mobile and Ohio Railroad*,¹⁹¹ Brickell, C. J., referring to the above decisions, says that the reason of them is that the transaction is in effect a mortgage, and offends the policy of the registration laws. But in Alabama bailments with leave to buy are distinguished, as in Pennsylvania, from conditional sales as above stated.¹⁹²

In *Deal v. Palmer*,¹⁹³ to a note given for the price of a mule was added, "the mule to stand security for the price until paid for." This was held to be a chattel mortgage and there- ^{North Carolina.} fore void, unless recorded. But this case was overruled in *Clayton v. Heister*.¹⁹⁴

In South Carolina, on a conditional sale, a reservation ^{South Carolina.} of title is void by statute unless in writing.

In *Talmage v. Oliver*,¹⁹⁵ a horse was sold by agreement in writing, property being reserved till paid for. The property was mortgaged by the buyer, and he absconded, leaving the price unpaid. The seller sought to recover the horse from the mortgagee in possession. The court held the conditional sale to be an equitable mortgage, and sustained it as such. Simpson, C. J., said: "It had all the elements of

188. 10 Weekly Notes of Cases 219. Md. 333, 341; *Hall v. Hinks*, 21 Md. 406;
189. *Sumner v. Woods*, 52 Ala. 94; *Old Dominion Steamship Co. v. Burck-*
Dudley v. Abner, 52 Ala. 572, 579. *hardt*, 31 Gratt. 664, 682.
190. 14 S. & R. 214. 193. 72 N. Car. 582.
191. 58 Ala. 165, 177. 194. 80 N. Car. 275, 277.
192. See, also, *Butler v. Gannon*, 53 195. 14 S. Car. 522.

a mortgage; it was to secure a contract, the property was designated and the title reserved to secure performance of this contract, and it is prior to respondent's mortgage. True, it was not recorded, but the action was commenced within the time allowed for recording, so that respondent had actual notice within this time. That was sufficient, and supplied the place of recording."

§ 460. In the New York Court of Appeals the cases are conflicting.

New York
decisions
conflicting.

In *Comer v. Cunningham*,¹⁹⁶ an effort is made to reconcile *Wait v. Green*¹⁹⁷ and *Smith v. Lynes*,¹⁹⁸ which are followed, with *Ballard v. Burgett*¹⁹⁹ and *Austin v. Dye*.²⁰⁰ See *ante* §§ 358-360. Until *Comer v. Cunningham* was decided, it was generally considered that *Smith v. Lynes* and *Wait v. Green* had been overruled. In the *Am. Law Reg.* for April, 1882, Mr. Landreth refers to a statement of the judge who delivered the opinion in *Wait v. Green*, that "the heresy of that case should not be perpetuated." See, also, the language of the court in *Austin v. Dye*, *supra*, relative to *Wait v. Green*. The distinction attempted in *Comer v. Cunningham* between conditional sales and conditional deliveries is even more difficult of application than that in Pennsylvania between conditional sales, and bailments accompanied by an agreement to sell. The principle suggested by Judge Comstock, in *Herring v. Hoppock*, above quoted, (*ante* § 452,) which has been adopted as the correct rule in the Federal courts and in Illinois, South Carolina, Kentucky and Alabama, is easy of application, and, by the aid, in some states, of legislation, bids fair to become the doctrine of the future.²⁰¹

§ 461. In a number of the states, statutes have been enacted to the effect that contracts for conditional sales, where possession is delivered and the property reserved to the seller to secure the price, shall be void as to the buyer's creditors and vendees without notice, unless such contracts are in writing and filed or recorded in the office of some public officer, usually the clerk of the town or county.

196. 77 N. Y. 391.

197. 36 N. Y. 556.

198. 5 N. Y. 41.

199. 40 N. Y. 314.

200. 46 N. Y. 500.

201. A discussion of the Pennsylvania decisions will be found in the *American Law Register* for April, 1882, p. 224.

The writer, Mr. Landreth, collects the cases from the other states and argues that the Pennsylvania decisions are not well considered. But, as is above shown, the Federal courts and the courts of many states have reached a practical accord with the latest Pennsylvania decisions, though by a different line of argument.

Such statutes have been passed in Maine, as to cases where a note is given for the price,²⁰² in Vermont,²⁰³ in Minnesota,²⁰⁴ in Wisconsin,²⁰⁵ and in Iowa, where the act expressly includes those leases which provide that the rent paid shall be credited on the price.²⁰⁶ Similar statutes have recently been enacted in Missouri, Nebraska, Virginia, West Virginia and Texas, and perhaps in other states. As we have seen, the decisions in the Federal courts and in the courts of several of the states²⁰⁷ give to the ordinary chattel mortgage acts an interpretation that includes such conditional sales. The recent cases class leases coupled with an agreement for a sale of the chattel leased, and providing that the rent paid shall be credited on the price, as conditional contracts of sale. In *Whitcomb v. Woodworth*,²⁰⁸ an instrument in the form of a lease was held to be in fact a conditional contract of sale and void, as to an attaching creditor of the buyer, for lack of record.

202. *Boynton v. Libby*, 62 Me. 253.

203. *Bugbee v. Stevens*, 53 Vt. 389.

204. *McClelland v. Nichols*, 24 Minn. 176.

205. *Williams v. Porter*, 41 Wis. 422; *Kimball v. Post*, 44 Wis. 471; *Bunn v. Valley Lumber Co.*, 51 Wis. 376.

206. *Singer Co. v. Holcomb*, 40 Iowa

33; *Myer v. Car Co.*, 102 U. S. 1, 10.

207. *Ante* §§ 454-460.

208. Vermont Sup. Ct., January Term, 1882. See, also, to the same effect, *Brunswick v. Hoover*, 10 Weekly Notes of Cases 219; *Heryford v. Davis*, 102 U. S. 235, *Greer v. Church*, 13 Bush 430; *Murch v. Wright*, 46 Ill. 487.

CHAPTER IV.

SALE OF CHATTEL NOT SPECIFIC.

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§ 462. When the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass. There is but little difficulty in the application of this rule.¹

In *Wallace v. Breeds*, (a) the sale was of fifty tons of Greenland oil, "allowance for foot-dirt and water as customary." The vendors gave an order on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex-ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfinger, and the order was then countermanded by the vendors, nothing having been done on it. *Held*, that the property had not passed.

So in *Busk v. Davis*, (b) the vendor had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and sold ten tons of it, giving an order to the purchaser on defendant for "ten tons Riga PDR. flax, ex *Vrouw Maria*." In order to ascertain what portion of the flax was to be appropriated to this order, it

1. See the American cases *post* § 469, *at seq.*

(a) 13 East 522.

(b) 2 M. & S. 397.

was necessary to weigh the mats, and this had not been done, when the buyer became insolvent, and the vendor thereupon countermanded the order. *Held*, that the property had not passed.

§ 463. In *White v. Wilks*, (c) the sale was of twenty tons of oil, out of the vendor's stock in his cisterns. In *Austen v. Craven*, (d) the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In *Shepley v. Davis*, (e) of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing.

*White v.
Wilks.*

*Austen v.
Craven.*

*Shepley v.
Davis.*

In *Gillett v. Hill*, (f) Bayley, J., stated the law very perspicuously in the following words: "The cases may be divided into two classes; one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable till that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided.*" (g)

Gillett v. Hill.

§ 464. [In *Gabarron v. Kreeft*, (h) the sale was of all the iron ore, the produce of a certain mine in Spain. The contract provided that the price should be paid by the defendants' acceptances, to be given on a certificate, that the quantity of ore drawn for was in stock, and that thereupon the property in the ore so drawn for should vest in the defendants. In carrying out the contract the defendants' acceptances, at a particular time exceeded the amount of all the ore already shipped, so that the defendants were entitled to a further quantity of the ore then in stock, as to which, however, no certificate had been given. *Held*, that in the absence of any specific appropriation of the ore by the seller in fulfillment of the contract no property in any of the ore in stock could vest in the defendants.]

*Gabarron v.
Kreeft.*

(c) 5 Taunt. 176.

(d) 4 Taunt. 644.

(e) 5 Taunt. 617.

(f) 2 C. & M. 530.

(g) See, also, *Campbell v. Mersey Docks Company*, 14 C. B. (N. S.) 412.

(h) L. R., 10 Ex. 274, fully considered *post*, Chap. VI.

§ 465. The only case to be found in the reports in apparent contradiction to this principle of the law of sale, is *Whitehouse v. Frost*,⁽¹⁾ which, notwithstanding explanations by the judges in subsequent cases, is scarcely ever mentioned, without suggestion of doubt or disapproval.² In that case the contract was as follows: "Mr. J. Townsend bought of J. and L. Frost ten tons of Greenland oil, in Mr. Stainforth's cisterns, *at your risk*, at £39—, £390." There were then in the cistern forty tons of oil, which had belonged to Dutton and Bancroft, and they had sold ten tons of it to Frost & Co., and these were the ten tons which the latter sold to Townsend, giving Townsend an order on Dutton and Bancroft for "the ten tons of oil we purchased from you 8th Nov. last." The order was taken to Dutton and Bancroft by the purchaser, and accepted by them in writing on the face of the order. Townsend left the oil in the custody of Dutton and Bancroft, and it was not severed from the bulk in the cisterns. It was held that the property had passed, as between Frost and Townsend. Lord Ellenborough put it on the ground that all right in the seller was gone by the acceptance of his delivery order in favor of Townsend, the seller never having had himself possession, but only a right to demand possession from the bailees, which right he had assigned to Townsend, just as it had been assigned to himself by his vendors. Grose, J., was of opinion that as the *risk was in the buyer*, and the delivery complete so far as the *vendor* was concerned, the property had passed. It was the *purchaser's* business to act with Dutton and Bancroft in drawing off the ten tons of oil. Le Blanc, J., put it on the ground that the sale was complete between Frost and Townsend, because nothing remained to be done *between them*. The vendor had given to the purchaser the only possession that the vendor ever had, and the purchaser had accepted this, and Dutton and Bancroft were bailees of the oil for the purchaser's use. All that remained to be done was between the purchaser and *his* bailees. Bayley, J., was very much of the same opinion, considering the purchaser's acceptance of an order on Dutton and Bancroft, his presentation of it to them, and obtaining their assent to be his bailees, as equivalent to a consent that the goods should be deemed to have

(1) 12 East 614.

2. *Whitehouse v. Frost* has been recognized in most of the states as a correct adjudication, and the principle that title may pass without separation has been

widely extended. *Jackson v. Anderson*, 4 Taunt. 24, may be consulted in support of the same proposition. See *post* § 477 *et seq.*

been delivered to him. This case was much questioned in subsequent decisions. (j) In *Wallace v. Breeds*, (k) Lord Ellenborough again said of *Whitehouse v. Frost*, "there nothing remained to be done by the seller to complete the sale between him and the buyer." And in the subsequent case of *Busk v. Davis*, (l) where three of the judges (Lord Ellenborough and Le Blanc and Bayley, JJ.,) who decided *Whitehouse v. Frost*, were still on the bench, they adhered to the decision, both Le Blanc and Bayley saying, however, that the sale was of an "undivided quantity," and that delivery had been made of that undivided quantity so far as in the nature of things it was possible for the vendor to deliver it.

The cases in which those contracts are considered, by which the vendor agrees to make and deliver a chattel, are reviewed in the next chapter on "Subsequent Appropriation."

Does giving of earnest alter property?

§ 466. This seems to be an appropriate occasion for considering the question whether earnest has any, and what, effect in altering the property in the goods which are the subject matter of the contract.

In former times, when the dealings between men were few and simple and consisted, for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest the property passed. Thus we have seen in the second chapter of this book that *Shepherd's Touchstone* contains this rule: (m) "If one sell me his horse, or any other thing for money, * * * and I give earnest money, albeit it be but a penny, to the seller, * * * there is a good bargain and sale of the thing to alter the property thereof." And Noy says (*ante* § 314): "If the bargain be that you shall give me £10 for my horse, and you give me one penny in earnest, which I accept, this is a *perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows very plainly that the authors were considering the subject of the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A to buy, and B to sell, did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, in *what-*

(j) See *White v. Wilks*, 5 Taunt. 176;
Austen v. Craven, 4 Taunt. 644; *Campbell v. Mersey Company*, 14 C. B. (N. S.)
 412; *Blackburn on Sale* 125.

(k) 13 East 525.
 (l) 2 M. & S. 397.
 (m) *Ante* § 313.

ever form, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale.

So, in *Bach v. Owen*,⁽ⁿ⁾ the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered to deliver the colt; but Buller, J., said: "The payment of the halfpenny vested the property of the colt in the defendant," and the tender was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which altered the property as soon as the earnest given prevented either party from retracting.

§ 467. In *Hinde v. Whitehouse*,^(o) Lord Ellenborough, in considering the mode of passing the property in the sugar sold, rejected a defence founded on the fact that the goods were not ready for delivery because the duties had not yet been paid, and said, *arguendo*: "Besides, after earnest given, the vendor cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him, and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His lordship, after quoting this *dictum* from Holt, C. J., in *Langford v. Administratrix of Tyler*, Salk. 113, and Noy's Maxims, as above, continued: "On this latter ground, therefore, *I do not think that the sale is incomplete*." This, again, was the sale of a specific chattel, and the mind of that great judge was plainly intent on the question whether there had been a "*complete sale*," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also,^(p) if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain, and thus furnishing proof

(n) 5 T. R. 409.

(p) 2 Black. Com. 447-9.

(o) 7 East 558.

of such a complete contract of sale as suffices to pass property in a specific chattel.

§ 468. No case, however, has been found in the books in which the giving of earnest has been held to pass the property in the subject matter of the sale, where the completed bargain, if proved in writing or any other sufficient manner, would not equally have altered the property. It is difficult to conceive on what principle it could be contended that the giving of earnest would pass the property, for example, in fifty bushels of wheat, to be measured out of a larger bulk.³ In the cases of *Logan v. Le Mesurier*, (g) and *Acraman v. Morris*, (r) it was held, as we have already seen (*ante* §§ 370, 372,) that where the whole purchase money had been paid at the time of the contract, the property did not pass in the timber which was to be afterwards measured on delivery, and it is scarcely conceivable that a penny, delivered under the name of "earnest," could be more effective in altering the property than the payment of the entire price.

It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest

Submitted
that it does
not.

3. The above language of our author was approved in the United States Supreme Court, in the case of *The Elgee Cotton Cases*, 22 Wall. 180, 195. Strong, J., said: "The receipt of \$30, 'in order to confirm the contract,' can have no bearing upon the question whether the property passed. The confirmation of the contract and its effect are distinct matters. Whatever may have been thought by some old writers respecting the effect in the transmission of property, of giving and receiving earnest money, it is now considered of no importance, or of the smallest importance." In *Nesbit v. Burry*, 25 Penna. 208, 210, Lowrie, J., said: "Nor does earnest or part payment aid in vesting the title where the quantity is yet to be ascertained, and there is no delivery. Under such circumstances the contract is essentially executory, and the part payment only shows a concluded and binding

agreement." See, also, *Jennings v. Flanagan*, 5 Dana (Ky.) 217. Notwithstanding these decisions, as to the effect of earnest, the payment of the price is often an important fact to be considered in determining whether the parties intend that title shall pass. In *Terry v. Wheeler*, 25 N. Y. 520, stated *ante* § 330, the fact that the price was paid was the circumstance controlling the decision that title had passed, and the same may be said of *Hurff v. Hires*, 40 N. J. L. 581, stated *post* § 480. The fact of full payment was also one of the grounds relied upon to show that title had passed in *Waldron v. Chase*, 37 Me. 414, and that case was distinguished in *Morrison v. Dingley*, 63 Me. 553, from the case before the court, because in the latter, payment had not been made. See *post* § 482.

(g) 6 Moo. P. C. 116.

(r) 8 C. B. 449.

was given, but by the true nature of the contract concluded by the giving of the earnest.*

AMERICAN DECISIONS.

§ 469. Where the property sold is not specific, and the seller may satisfy his contract by furnishing any property of the requisite character, it follows from necessity that no property passes until the goods are appropriated to the contract.⁴ What constitutes such appropriation is considered in the next chapter.

But as has been stated, (*ante* § 310, note 4,) where the property sold is part of a specific mass from which it has not been separated, a different question arises. The English cases hold that separation is essential to pass the property. In most of the American courts, however, a distinction is made, and it is held that where the mass from which

*The rest of this chapter is by the American editor.

4. See *Low v. Pew*, 108 Mass. 347, stated *ante* § 78, note 3. In *First National Bank of Marquette v. Crowley*, 24 Mich. 492, an iron company agreed to manufacture and deliver two hundred tons of iron on its own premises, and received payment. Sixty-five tons were manufactured and piled for the buyer but not marked, and were seized for a debt of the seller, and the buyer replevied. It was held that the buyer had no title. *Christianity, J.*, said: "The vendors would have had a perfect right to say to the plaintiff, 'True, we agreed to sell you two hundred tons of iron, but it was not this particular iron, though of the same quality.'" See *Hahn v. Fredericks*, 30 Mich. 224, and *Crapo v. Seybold*, 35 Mich. 169. But see *Carpenter v. Graham*, 42 Mich. 191, stated § 485, *post*. In *Ormsby v. Machlin*, 20 Ohio St. 295, the suit was for the price of eight thousand bushels of corn sold under a written contract which did not specify what corn was meant. It was held error to permit the seller to prove that the corn meant was a lot stored in his bins, and that no title had passed for want of specification,

and the suit for the price would not lie. In *May v. Hoaglan*, 9 Bush 171, a distiller agreed to furnish the buyer eight barrels of whiskey on or before May 1st next. He released the proper number from bond in a government warehouse, but before delivery they were attached for his debt. It was held that the attachment was good, title not having passed. See *Johnson v. Pierce*, 16 Ohio St. 472; *Ingraham v. Whitmore*, 75 Ill. 24; *Home Insurance Co. of New York v. Heck*, 65 Ill. 111, 117; *Higgins v. Del., L. & W. R. R.*, 60 N. Y. 553; *Bancher v. Warren*, 33 N. H. 183; *McCandlish v. Newman*, 22 Penna. 460; *Winslow v. Leonard*, 24 Penna. 14; *Smyth v. Ward*, 46 Iowa 339; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *Stephens v. Tucker*, 55 Ga. 543; *Lewis v. Lofley*, 60 Ga. 559; *Brown v. Childs*, 2 Duv. 317; *Moss v. Meshew*, 8 Bush 187; *Smith v. Sparkman*, 55 Miss. 649; *Pew v. Lawrence*, 27 U. C. C. P. 402; *Robertson v. Strickland*, 23 U. C. Q. B. 221; *McNeil v. McIlmoyle*, 34 U. C. Q. B. 236; *McDougall v. Elliott*, 20 U. C. Q. B. 299; *Butters v. Stanley*, 21 U. C. C. P. 402; *Pollok v. Fisher*, 1 Allen (N. R.) 515; *Tonkins v. Tibbit*, 1 Hannay (N. B.) 307.

the sale is made is uniform in character and quality, such as oil in a tank, or grain in an elevator, then title will be deemed to pass by the contract in the same manner as though the property was specified. Where the property sold is part of a mass made up of units of unequal quality, such as a number of cattle out of a herd, their selection being material, the decisions all hold that title will not pass until it has been made.⁵

In Ohio and some other states the English rule is adopted, and it is held that separation is essential to the passing of property in goods sold from a larger quantity, whether uniform in character and value or not.

§ 470. The leading American case holding that title may pass to an unsevered part of a bulk is *Pleasants v. Pendleton*,⁶ stated *post* § 477. This was decided in 1828. The leading American case holding that title does not pass is probably *Woods v. McGee*,⁷ decided in the Ohio Supreme Court in 1836. In the latter (as in the former) case the sale was of a number of barrels of flour, part of a larger lot in a store-house, all of the same brand. It was held that the buyer could not maintain trover, because the barrels bought by him had not been separated, and the court criticised *Pleasants v. Pendleton*. There was one important circumstance in *Woods v. McGee*, not mentioned in the opinion, but which clearly distinguished the case from that criticised, namely, *the barrels of flour varied from twenty-five to fifty cents in value*. Separation, therefore, was material to pass title. Another case often cited is *Hutchinson v. Hunter*,⁸ decided in the Pennsylvania Supreme Court in 1847. In that case the sale was of 100 barrels of molasses out of a lot of 125, *varying somewhat in quantity*. The price was paid by estimating the average, and the buyer resold on credit, but the barrels were not selected, and were destroyed by fire. The first buyer sued his vendee for the price, but it was held that title had not passed, and therefore the suit could not be sustained. *Woods v. McGee* was cited and approved, but the court said that the case was put on the fact that the barrels were of unequal quantities and values, and had not been separated from the molasses still owned by the vendor.⁹

American decisions that title does not pass before identification.

5. See, however, *Watts v. Hendry*, 13 Fla. 523, stated *post* § 486.

6. 6 Rand. 473.

7. 7 Ohio 466.

8. 7 Penna. 140.

9. See *Chapman v. Shepard*, 39 Conn. 413, 423, (*post* § 482,) commenting on *Woods v. McGee*, and *Hutchinson v. Hunter*.

§ 471. In *Golder v. Ogden*,¹⁰ in the same court (1850), the sale was of 1000 pieces of wall paper, which were paid for, to be taken out of a lot of uniform quality. Before it was set apart the seller made an assignment for the benefit of creditors. It was decided that the buyer took no title. This case cannot easily be reconciled with *Pleasants v. Pendleton*, nor can the case of *Haldeman v. Duncan*,¹¹ decided in the same court in 1865. In that case 300 barrels of oil were bargained and paid for, and the seller told the buyer to select the number out of a large lot at the place of delivery. The buyer examined a number of barrels, and declared that he was satisfied. A flood swept all the oil away, and the buyer sued for damages for non-delivery. The action was sustained. The court cited *Hutchinson v. Hunter*, *supra*, and asserted in general terms that the goods must be ascertained and separated before the property can pass.

§ 472. In *McLaughlin v. Piatti*,¹² five hundred cattle were sold out of a large herd, and were paid for. The buyer was authorized to make the selection, and was put in joint possession with the seller of the whole herd. Before the division was made the seller resold the whole herd. The first buyer's grantee filed a bill for the specific performance of the contract. The court held that no title had passed, because there had been no selection, and *Hutchinson v. Hunter* and *Woods v. McGee*, *supra*, are cited.

In *Stone v. Peacock*,¹³ the owner of a quantity of hay agreed to give defendant one-third of it to bale it. The hay was baled and left in the barn of the owner, who soon after died insolvent. Defendant took away one-third of the hay in the barn, and was sued in trover by the administrator of the insolvent estate. The action was sustained because "no particular portion was designated as belonging to defendant. The hay might have varied in quality, and it was probably of unequal value, and an important act remained to be done, in which both parties had the right to participate."

10. 15 Penna. 528.

11. 51 Penna. 66. In regard to both this case and *Golder v. Ogden*, however, it may be said that it is not clear that the parties had reference to any specific goods out of which those sold should be taken. If neither the goods themselves, nor the mass out of which they were to be taken, can be regarded as specific, and if the seller could have satisfied the sale by de-

livery of any goods of the requisite character, then it is clear that title did not pass, and these cases are not in conflict with *Pleasants v. Pendleton*, and the other cases cited *post* § 477, *et seq.* See *Hutchinson v. Commonwealth*, 82 Penna. 472, stated *post* § 486.

12. 27 Cal. 451, 463.

13. 35 Me. 385, 388.

§ 473. In *Courtright v. Leonard*,¹⁴ the sale was of 25,000 brick, to be taken off the west end of a kiln of 111,000. Before they were taken away they were levied upon for a debt of the seller, and the buyer replevied from the officer. The court held that title had not passed, citing *Woods v. McGee*, *supra*, § 470.

A precisely opposite conclusion was reached on the same facts in *Crofoot v. Bennett*, 2 N. Y. 258, stated *ante* § 394.

In Iowa the principle of *Courtright v. Leonard* was followed in *Rosenthal v. Risley*.¹⁵ The plaintiff had furnished the defendant money to buy grain at a certain price. Defendant bought more than enough to fill the order, and the plaintiff brought replevin for so much as had been bought with his money. But the court held that the plaintiff had no property in any of the grain until it was set apart for him. In *Cook v. Logan*,¹⁶ 300 bushels of grain were stored in a bin on land of one to whom the owners sold 20 bushels of it. The land-owner refused to permit the grain taken away until he had received his 20 bushels, and the owners brought replevin and took the grain. On the trial the land-owner obtained a verdict for the value of the 20 bushels, but on appeal this was reversed because no property had passed, for want of separation. This last case is plainly in conflict with most of the recent American decisions. See *post* § 477, *et seq.*

§ 474. In *Ropes v. Lane*,¹⁷ it was held that where a number of barrels of mackerel were sold, part of a larger lot, no title would pass until separation, though all were of the same quality.

In *Reeder v. Machem*,¹⁸ the sale was of 500 tons of coal out of a larger quantity in the yard of the seller, and the greater part of the price was advanced. The sellers became insolvent before the coal was separated from the mass and a receiver was appointed, who claimed the coal, and it was adjudged to belong to him. Alvey, J., said: "There may be, it is true, power delegated to the buyer to separate from a larger quantity, and to weigh or measure the commodity bargained for, in the absence of the seller, and upon such separation, weighing or measurement being done, in pursuance of the authority, the property will vest in the vendee. But there is no evidence whatever of any such authority having been delegated in this case."

§ 475. In *Ferguson v. Louisville Bank*,¹⁹ the owners of a large number of hams packed by them and having the same trademark, and

14. 11 Iowa 32.

15. 11 Iowa 541.

16. 7 Iowa 142.

17. 9 Allen 502.

18. 57 Md. 56.

19. 14 Bush 555.

in their warehouse, borrowed money of a bank and gave as security a warehouse receipt for 3600 hams, weighing 50,400 pounds, "on storage in our pork-house, which we will deliver on return of this receipt properly endorsed." The owners soon after made an assignment for the benefit of creditors, and the assignee and the bank both claimed the hams. The court adjudged that they were the property of the assignee, notwithstanding the statute of 1869, which provided that property in a warehouse might be transferred by endorsement of warehouse receipts. Pryor, C. J., said that to pass the title, the receipt transferred must relate to specific property. "Where the subject matter of the sale is in bulk, and a certain quantity is sold, to be taken from a greater quantity, no title passes until the separation is made." And *Kimberly v. Patchin* is mentioned with some disfavor.

§ 476. In *New Hampshire* the question arose in 1826, in *Davis v. Hill*.²⁰ In that case the buyer paid for three tons of hay, to be weighed out of a certain mow when he should see fit to move the same. The hay was taken by a third person, against whom the buyer brought trover. The court held that to maintain trover, plaintiff must prove some property in the goods, and that in this case he had none, for want of separation from the general mass.

*Messer v. Woodman*²¹ was also a case of sale of hay from a larger bulk, and *Davis v. Hill* was followed. *Ockington v. Richey*²² was a sale of lumber out of a larger lot, and *Bailey v. Smith*²³ of 2000 telegraph poles out of a lot of 2130. In both cases the property was carried away by a freshet before the separation was made, and it was held that the seller must bear the loss.²⁴

§ 477. Notwithstanding the decisions above stated, the weight of recent American authority supports the proposition that when property is sold, to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. This intent will

Decisions that title may pass before separation.

20. 3 N. H. 382.

21. 22 N. H. 172.

22. 41 N. H. 275.

23. 43 N. H. 141.

24. See, further, to the effect that title will not, in general, pass until the goods sold are separated from the bulk of which they form part, the following cases: *Morrison v. Woodley*, 84 Ill. 192; *Chissom v. Hawkins*, 11 Ind. 316; *Williams v. Feini-*

man, 14 Kan. 288; *Bailey v. Long*, 24 Kan. 90; *Caruthers v. McGarvey*, 41 Cal. 15; *Waldo v. Belcher*, 11 Ired. (N. C.) L. 609; *Cleveland v. Williams*, 29 Tex. 204; *Gardiner v. Suydam*, 7 N. Y. 357; *Browning v. Hamilton*, 42 Ala. 484; *Mobile Savings Bank v. Fry*, 14 Law Reporter 111; *Cockburn v. Sylvester*, 27 U. C. C. P. 34; on appeal, 1 Ont. App. 471.

be inferred from the fact of payment of the price, or from delivery of the whole to the buyer with power to make the separation. Where the property is in the possession of a third person, the intent will be manifested by giving an order to such third person to deliver a specified part, or by assigning a certificate of deposit, such as a receipt for part of grain in a mass in an elevator. If in the possession of the vendor, he may constitute himself bailee. The reason is because selection is immaterial when the quality is uniform.

The earliest American case where this principle was applied is *Pleasants v. Pendleton*,²⁵ a case decided in 1828 in the Virginia Court of Appeals, where the subject was thoroughly discussed. In that case 119 barrels of flour were bargained for out of a lot of 123 of the same brand and quality, and a check was given for the price, but before the flour was removed both that and the check were destroyed by fire. The seller sued for the price, and the defence was that the property had not passed, because the flour sold had not been separated from the bulk. Brooke, Pres., said: "In a case in which identity is a matter of total indifference, both to the vendor and vendee, either as regards price or quantity, it is certainly of no importance." And it was held that title passed on the sale and the buyer must pay the price. *Jackson v. Anderson*²⁶ was cited and approved. In that case the owner of 4718 Spanish dollars in a cask agreed to sell 1969 therefrom, and the buyer bringing trover therefor, Lord Mansfield said that the property had passed, and the suit would lie, though no separation had been made.

§ 478. *Kimberly v. Patchin*,²⁷ mentioned *ante* § 396, is the case usually cited on this point. It was a case of a sale of 6000 bushels of wheat out of a larger quantity. The seller gave the buyer a receipt acknowledging that he held 6000 bushels in storage for him, and received the greater portion of the price, but before the wheat was taken the seller sold it over again to another purchaser. The question of title arose between these two purchasers. Comstock, J., in an opinion of signal ability, said: "It appears to me that a very simple inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible, in reason and in law, for one man to own a given portion of it and for another man to own the residue, without a separation of the parts? To bring the

25. 6 Rand. 473, 503.

26. 4 Taunt. 24.

27. 19 N. Y. 330.

inquiry to the facts of the case: In the storehouse of D. there was a quantity not precisely known. In any conceivable circumstances, could S. become owner of 6000 bushels and D. of the residue without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6000 bushels and then one to D. for the residue, more or less, what would have been the result? The former owner most certainly would have parted with all his title. One purchaser would be entitled to 6000 bushels and the other to what remained. Again, suppose D., having in store 249 bushels, S. had deposited with him 6000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property, where neither would lose his title. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question so to deal with each other as to effectuate that result. One of them being owner of the whole, he could stipulate and agree that the other should thenceforth own 6000 bushels, without a separation from the residue. And this, I think, is precisely what was done." Therefore, the court sustained the title of the first purchaser.²⁸ The same court applied the same principle in *Russell v. Carrington*²⁹ and *Lobdell v. Stowell*.³⁰

§ 479. The principle of these decisions is illustrated by the cases of *Foot v. Marsh* and *Higgins v. Del. and L. R. R.*³¹ In the former case, 100 barrels of oil were sold out of a lot of 150, the buyer to pay storage until he took away his purchase. More than half the contents of the barrels was lost by leakage. It was held that the seller must bear the loss because the oil in the various barrels differed in quality, this circumstance distinguishing the case from *Kimberly v. Patchin*. That case was also distinguished in *Higgins v. Del. and L. R. R. Co.* In that case, the company offered for sale 90,000 tons of coal at auction, of which the plaintiff bought 100, but it was held that he acquired no title because no lot of 90,000 tons had, at the time of sale, been collected in one mass, nor had all the coal sold been taken out of the mines, and the buyer had not bargained for his coal out of any specific mass.

28. *Whitehouse v. Frost*, *ante* § 465, and *Pleasants v. Pendleton*, *ante* § 477, were cited. See, also, *Crofoot v. Bennett*, 2 N. Y. 258, stated *ante* § 394.

29. 42 N. Y. 118.

30. 51 N. Y. 70.

31. 51 N. Y. 288 and 60 N. Y. 558.

§ 480. In the New Jersey Court of Errors and Appeals, in the case of *Hurff v. Hires*,³² 200 bushels of corn were bargained for out of a lot of 500 bushels in the seller's ^{New Jersey.} crib, and the price was paid in full. It was agreed that the seller should deliver it when it was dry enough to keep well in bulk. Before delivery or separation the corn was levied upon for a debt of the seller. The buyer claimed 200 bushels of the corn, and his title was the subject of inquiry in an action of trover. In an opinion of great research, Depue, J., said: "It is undoubtedly the doctrine of the English courts that where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right does not pass to the vendee until the vendor has made his selection."³³ This doctrine is founded on correct principles, where the gross bulk is variable in kind or quality, and the selection from it of that part which shall be delivered is of benefit to the vendor. In my judgment, this principle should not be applied where the bulk from which the quantity purchased is to be separated, is uniform in kind and quality, and has been approved by the purchaser, and the full contract price has been paid. There is a clear and well-settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and those in which there is no uniformity in these respects. It is recognized in cases of a cotenancy of personal property, readily divisible by weight or measurement into portions absolutely alike in quality and value. In such cases, either tenant may take his proper proportion, and it will be regarded as a proper severance, so long as he does not take more than his share."³⁴ It was accordingly determined that the question whether the parties intended that title should pass should be submitted to the jury. *Whitehouse v. Frost*, stated *ante* § 465, is approved.³⁵

32. 40 N. J. L. 581, 588.

33. Per Bailey, B, *Gillett v. Hill*, 2 C. & M. 530. See *Aldridge v. Johnson*, 7 E. & B. 885.

34. Cites *Clark v. Griffith*, 24 N. Y. 595, 6 Am. Law Rev. 458; *Jackson v. Anderson*, 4 Taunt. 24.

35. *Depue, J.*, also cited *Woodley v. Coventry*, 2 H. & C. 164; *Gillett v. Hill*, 2 C. & M. 530; *Knights v. Wiffen*, L. R., 5 Q. B. 660; and *Farmeloe v. Bain*, 1 C. P.

Div. 445, and said: "These cases, it is true, were against defendants who were treated as mere custodians of the property, and the right to maintain the action was put on the ground of estoppel. The English courts make a distinction between this class of cases and actions directly between the vendor and purchaser. But, manifestly, this distinction is in semblance only and not in substance."

§ 481. Whether the law is the same in Massachusetts is not clear.

Massachusetts. In *Scudder v. Worster*,³⁶ 150 barrels of pork were bargained for, but not separated from a larger lot of the same quality. The buyer brought replevin for the goods, and it was held that it would not lie, though it was intimated that trover would. Referring to *Pleasants v. Pendleton* (*ante* § 477) Dewey, J., quotes the language of Grimke, J., in *Woods v. McGee*,³⁷ that "it was a hard case, and hard cases make shipwreck of principles."

But in *Cushing v. Breed*,³⁸ 500 bushels of oats in an elevator were sold, being part of a larger lot. The buyer received an order on the proprietors of the elevator and took part of the oats. The rest was destroyed by fire. On suit for the price it was held that title had passed to the whole. Chapman, J., said that the owners of grain in the elevator were tenants in common, and if one of them sells the whole or part of his interest, the purchaser becomes a tenant in common with the others.

But in *Keeler v. Goodwin*,³⁹ on a similar bargain, the seller countermanded the order before it reached the warehouseman, because of the buyer's bankruptcy, and it was held that a *bona fide* purchaser of the order from the buyer could not recover its value from the seller who refused to give it up. Wells, J., said that to pass the title there was necessary either actual separation "or appropriation to the use or credit of the purchaser, in the usual mode of transacting the business of the warehouse."

§ 482. In *Waldron v. Chase*,⁴⁰ 500 bushels of corn were bought and paid for out of a lot of 15,000 bushels, and the buyer *Maine.* took away part. The rest was destroyed by fire, and the buyer sued to recover back the price paid for it. But the court decided that the title and risk of loss had passed. This decision and *Kimberly v. Patchin* were urged as precedents in the case of *Morrison v. Dingley*.⁴¹ In that case the owner of 250 tons of coal agreed to sell 125 tons gross to the plaintiff, and the residue to the defendant. Plaintiff drew away 125 tons net, and was then stopped by defendant,

36. 11 Cush. 573.

37. 7 Ohio 127.

38. 14 Allen 376. See, also, *Damon v. Osborn*, 1 Pick. 476, where one, who bought a certain number of brick to be taken out of a certain kiln, was held liable for the price of the whole, though

he had taken only part, and the rest had not been separated.

39. 111 Mass. 490.

40. 37 Me. 414. See *Warren v. Milliken*, 57 Me. 97; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466.

41. 63 Me. 553, 556.

who took all the residue. Plaintiff thereupon brought trover for the rest of the quantity to which he was entitled, about 15 tons. Appleton, C. J., said that in *Kimberly v. Patchin* the owner gave a receipt for the property and constituted himself bailee for the purchaser, and in *Waldron v. Chase* the owner received full payment, and in both cases title passed by the contract, though the goods were not separated from the heap. But in the case before the court there was no receipt given or payment, and the owner did not make himself bailee, and title passed only to so much of the coal as the buyer had taken away. Dickerson, J., dissented.

In *Chapman v. Shepard*,⁴² 600 bags of meal were sold on credit and left in the seller's schooner. The buyer resold 500 bags, receiving the price, and the second purchaser took part of the meal. The seller refused to give up the rest because of the insolvency of the first buyer, and the second buyer brought trover. The suit was sustained on the authority of *Pleasants v. Pendleton*, *Kimberly v. Patchin* and *Waldron v. Chase*, *supra*.

§ 483. In Illinois the leading case seems to be *Dole v. Olmstead*.⁴³ It is there held that corn delivered at a grain elevator and stored in a common mass is owned by the depositors as tenants in common, and may be transferred as such. There is an older case, *Dunlap v. Berry*,⁴⁴ where it was held that a sale of a portion of the bricks in a kiln would not be complete until they were separated.

But in Illinois, dealings with grain in bulk by means of warehouse receipts is every-day practice, and such dealings are recognized as competent to pass title to any part of the bulk without separation. In *Broadwell v. Howard*,⁴⁵ a warehouseman transferred grain on storage with him by giving receipts acknowledging that he held it for the buyer. It was seized for the debt of the warehouseman, and the buyer replevied and his suit was sustained.

Statutes have been passed in that state and in others regulating dealings in grain stored in warehouses and elevators. In fact, in Illinois there are provisions as to grain elevators in the constitution itself.

§ 484. In Wisconsin, *Kimberly v. Patchin* has been often approved

42. 39 Conn. 413.

44. 4 Scam. 327.

43. 36 Ill. 150; 41 Ill. 344. See, also,

45. 77 Ill. 305.

Barker v. Bushnell, 75 Ill. 220.

and followed. The leading case on the subject in that state is *Young v. Miles*.⁴⁶ A warehouseman received wheat from various parties, to whom he gave storage receipts, mingling the grain with his own. Out of the mass he delivered the greater portion to a commission agent to sell, and one of the depositors, finding that there was not wheat enough left in the elevator to cover his receipt, brought replevin against the agent. The court sustained the suit, refusing to follow *Scudder v. Worster*, (*ante* § 481,) and assenting fully to the views of Comstock, J., in *Kimberly v. Patchin* (*ante* § 478.)

The law in California was declared in the case of *Horr v. Barker*.⁴⁷ There the owner of a lot of flour in barrels of the same brand and quality, stored with a warehouseman, sold it all in lots to different purchasers, the warehouseman being notified, but the barrels were not separated. They were all taken away wrongfully by one against whom one of the buyers brought trover. The suit was sustained, the court considering that title had passed. Burnett, J., said: "The flour being all of the same kind, and the entire lot sold by W., there was no practical end to be accomplished by marking, counting or separating. There being no choice, because of there being no difference between the barrels, the parties had the right to let their different portions remain together, and had a loss accrued without their fault, the same would have fallen upon each in proportion to his share of the whole."

After a new trial there was a further appeal,⁴⁸ and the same principles were announced. *Pleasants v. Pendleton* (*supra* § 477) was approved, and *Woods v. McGee* (*ante* § 470) was criticised.

§ 485. *Carpenter v. Graham*,⁴⁹ was a case where 1000 barrels were sold by the manufacturer, part of a lot of 7000, all stored with a warehouseman. A bill of sale was given, and the warehouseman agreed to hold 1000 for the buyer. New barrels were coming in and sales were made out of the stock every day. A levy was made on the whole stock, less than 3000 in number at the time of the levy. The buyer sued for conversion, and recovered on the ground that as the barrels were alike in size and quality, "no designation was intended or necessary to distinguish the particular lot sold from the others in store."

46. 20 Wis. 646, [615]; S. C., 23 Wis. 643. See *Newton v. Howe*, 29 Wis. 531.
 47. 8 Cal. 603; S. C., 8 Cal. 609; S. C., 11 Cal. 393.
 48. *Horr v. Barker*, 11 Cal. 393, 402.
 49. 42 Mich. 191. See *Brewer v. Mich. Salt Association*, 47 Mich. 523.

In *Piazzek v. White*,⁵⁰ a farm was leased, and the tenant agreed to deliver to his landlord one-third of the corn produced in a crib provided by the landlord. He filled the crib, and ^{Kansas.} having 300 bushels left, placed it with his own corn. The landlord brought replevin for the 300 bushels, and the suit was sustained on the authority of *Kimberly v. Patchin* and *Young v. Miles*, *supra*.

§ 486. *Watts v. Hendry*,⁵¹ is a case that goes very far to sustain the title of the buyer to property not specific. The sale ^{Florida.} was of 100 two-year-old steers, part of a herd of 4000 cattle running at large on a range. Some time after, the whole herd was sold, and the new owner, after notifying the purchaser of the 100 steers to take them away, upon his neglect to do so, laid claim to the whole. The court sustained trover by the first buyer against the second, citing *Kimberly v. Patchin*, *Pleasants v. Pendleton* and *Waldron v. Chase*, *supra*.

In *Page v. Carpenter*,⁵² where the seller agreed to deliver 150 tubs from an uncertain number in his barn, if the number proved greater, that number to be selected, and if less, the seller to add the rest, and the price was paid, and 12 tubs taken by the buyer, it was held that the buyer had the property as against a creditor of the seller who levied upon them. This was explained in *Bailey v. Smith*, (*ante* § 476,) by Bellows, J., who said that the whole were delivered, with a stipulation for a return by the buyer of the excess.

A like case is that of *Southwell v. Beezley*,⁵³ where, as appears by the syllabus, it was left to the jury to determine whether a contract to deliver 600 sheep was not satisfied by delivery of a greater number.

In *Phillips v. Ocmulgee Mills*,⁵⁴ the contract was for the sale of 125,000 pounds of cotton out of a larger lot, and the ^{Georgia.} buyer who had a factory near by resold half to his partner, and began to take cotton from day to day, weighing it as he used it, but the lot purchased was not separated from the bulk. The whole was burned by the federal army. It was held that title had passed, and the buyer was liable on his note for the price.

The principle of *Kimberly v. Patchin* was recognized in Pennsylvania in *Hutchison v. Commonwealth*,⁵⁵ a criminal case, ^{Pennsylvania.} where the question of the validity of a sentence depended

50. 23 Kan. 621. See *Kaufman v. v. Sargent*, 58 N. H. 241.
Schilling, 58 Mo. 218.

51. 13 Fla. 523.

53. 5 Oreg. 153.

54. 55 Ga. 633.

52. 10 N. H. 77. See, also, *Lamprey*

55. 82 Penna. 472.

on the question whether title passed to oil in tanks by delivery of an order for a small part thereof, no separation having been made or being contemplated. Paxson, J., said: "By the usage of trade each owner was entitled to draw out, not the identical oil put in, but oil which is its precise equivalent. We cannot close our eyes to the total revolution in the manner of doing business which has been brought about by the discovery of petroleum in this state. It has developed a new industry of vast importance. * * * Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the counterpart of every other barrel therein. It differs neither in quantity, quality or price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe Line Company." This was followed in *Wilkinson v. Stewart*,⁵⁶ where replevin was sustained for a part of the oil in a tank, *Kimberly v. Patchin* being cited.

§ 487. In the case of *Coffey v. Quebec Bank*,⁵⁷ the sale was of 2000 bushels of wheat out of a lot of 3000, stored in two bins in a warehouse, and transferred by endorsement of the receipt of the warehouseman, who agreed to hold 2000 bushels for the buyer. The whole property having been wrongfully seized by defendant, the buyer brought trover, and it was held in the Common Pleas that he could recover. *Whitehouse v. Frost* (*ante* § 465) was cited. On appeal⁵⁸ this judgment was affirmed on the ground that the warehouseman was estopped by his receipt from denying that he held 2000 bushels for the buyer, and that the tort-feasor was in no better position. This would probably be recognized as law in England.

A similar question arose in *Box v. Provincial Insurance Co.*⁵⁹ on appeal from the Chancellor. A warehouseman sold 3500 bushels of wheat, part of a larger quantity in store, and gave a receipt for it. The buyer insured the wheat. The warehouse was burned and the insurer defended a suit for the loss on the ground that the insured had no title, the grain not having been set apart. It was held (three out of eight justices dissenting) that the buyer had an insurable interest. Draper, C. J., said that he did not think the legal title had passed, but that a legal title was not indispensable to the creation of an insurable interest.⁶⁰

56. 85 Penna. 255.

57. 20 U. C. C. P. 110.

58. 20 U. C. C. P. 555.

59. 18 Grant's Ch. 280.

60. To the same effect see *Cumberland Bone Co. v. Andes Insurance Co.*, 64 Me. 466.

CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

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§ 488. After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in *Rhode v. Thwaites*, (a) "the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

The only difficulty that can arise on this question is in cases where

(a) 6 B. & C. 388.

When vendor
is to appropriate
the goods.

the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor is, by the express or implied terms of the contract, entitled to make the selection. A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty to *appropriate the goods to the contract*. The difficulty is to determine what constitutes the appropriation: to find out at what precise point the vendor is no longer at liberty to change his intention. It is plain that the vendor's act in simply selecting such goods as he *intends* to send, cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him, and no longer revocable.

§ 489. The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind. (b) ¹

For example, suppose A sell out of a stack of bricks one thousand to B, who is to send his cart and fetch them away. Here B is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind, until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done, his election is determined, and he cannot put back the bricks and take

(b) Heyward's Case, 2 Co. 36; Comyn's Dig., Election; Blackburn on Sale 128. 1. See American decisions *post* § 512 *et seq.*

others from the stack. So, if the contract were that A should load the bricks into B's carts, A's election would be determined as soon as that act was done, and not before.

It follows from this, says Lord Blackburn, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to *despatch* the goods, or do anything to Point of time at which property passes. them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the despatch or other act has commenced*, for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language, "the certainty, and thereby the property begins by election." (c) But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not yet final, for it is not made by the authority of the other party nor binding on him. (d)

§ 490. A review of the authorities will show the subtle distinctions to which this subject gives rise, and the infinite diversity Review of the authorities. of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the vendor, although appropriating the goods to the contract by despatching them, still retains control by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the vendor, although appropriating the goods, has reserved expressly or by implication a special property in them, will be separately examined, after disposing of those which are free from this element of controversy.

In 1803, in the case of *Dutton v. Solomonson*, (f) it was treated as already settled law that where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and *the property vests immediately*. Dutton v. Solomonson.
Delivery to carrier.

(c) *Heyward's Case*, 2 Coke 36; *MERCHANTS' National Bank v. Bangs*, 102 Mass. 291, 295. son, 7 E. & B. 885, 901; 26 L. J., Q. B. 296.

(d) *Blackburn on Sale*, p. 128. The accuracy of this statement of the law was attested by *Erle, J.*, in *Aldridge v. Johnson*, 7 E. & B. 269; and *Johnson v. The Lan-* (f) 3 B. & P. 582, per Lord Alvanley, C. J.; and see *Cork Distilleries Co. v. Great Southern, & Co., Railway Co.*, L. R., 7 H. L. 269; and *Johnson v. The Lan-*

Law in the
United States.

And in the United States the law is established to the same effect. (g) 2

§ 491. In 1825, *Fragano v. Long* (h) was decided in the King's Bench. The plaintiff sent an order from Naples to M. & Sons at Birmingham, for merchandise "to be des-

Fragano v. Long.

patched on insurance being effected. Terms to be three months' credit from the time of arrival." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the vendors in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier by being allowed to fall into the water while loading them, and the action was *assumpsit* against the carrier. It was contended by the defendant that the property had not passed because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the vendors, and they would therefore have been entitled to the bill of lading. But the court held that the property had passed to the plaintiff from the time *the goods left the vendors' warehouse*. Holroyd, J., said the principle was that "when goods are to be deliv-

Where vendor
pays for the
carriage.

ered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off." The words above printed in italics suggest that where the vendor pays the charges it is presumed that he retains the property in the goods. On this point the reader will find a very full exposition of the law in the elaborate opinion of Lord Cottenham, delivering the judgment of the House of Lords in *Dunlop v. Lambert*. (i)

§ 492. In *Rohde v. Thwaites*, (k) the appropriation by the vendor was assented to by the purchaser. The purchaser bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the vendor. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated to the contract by the vendor, who gave notice to the purchaser to take them away, which the latter promised to do. *Held*, that this was an assent

cashire and Yorkshire Railway Co., 3 C. P. D. 499, where, under somewhat curious circumstances, the same rule was applied.

(g) *Krulder v. Ellison*, 47 N. Y. 36.

2. See American decisions, *post* § 512, *et seq.*

(h) 4 B. & C. 219.

(i) 6 Cl. & Finn. 600.

(k) 6 B. & C. 388.

to the appropriation, that the contract was thereby converted into a bargain and sale, and that the property passed.³

In *Alexander v. Gardner*, (l) decided in 1835, the property in a parcel of butter was held to have passed from the plaintiff to the defendant by subsequent appropriation with mutual assent under the following circumstances. The original contract was for "200 firkins Murphy & Co.'s Sligo butter at 71s. 6d per cwt. free on board; payment, bill at two months from the date of lading; to be shipped this month. 11 Oct., 1833." On the 11th of November the plaintiff received from Murphy an invoice and bill of lading for these butters, which had not been shipped till the 6th of November. Defendant waived the delay, and consented to take the invoice and bill of lading, which described the butter, the weights and marks of the casks, &c. The butter was afterwards lost by shipwreck. Held, that the subsequent appropriation was complete by mutual assent; that the property had passed, and the buyer must suffer the loss. The case was decided directly on the authority of *Fragano v. Long*, and *Rohde v. Thwaites*.

§ 493. The same principle governed *Sparkes v. Marshall*, (m) decided by the same court in the following year (1836.) Bamford, a corn-merchant, sold to plaintiff "500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by Thomas John & Son, of Youghall." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiffs that Messrs. John & Son had engaged "room in the schooner Gibraltar Packet of Dartmouth to take about 600 barrels of black oats on your account." Plaintiff next day ordered insurance, "£400 on oats per the Gibraltar Packet of Dartmouth, &c." In this action against the underwriter it was contended by them that the property had not passed, but the court held the contrary. Tindal, C. J., said that Bamford's letter to the plaintiff "was an unequivocal appropriation of the oats on board the Gibraltar Packet," and "this appropriation is assented to and adopted by the plaintiffs, who, on the following day, gives instructions to his agent in London to effect the policy on oats per Gibraltar Packet."

§ 494. In *Bryans v. Nix*, (n) decided in the Exchequer in 1839,

3. *Rohde v. Thwaites* was cited and *kings v. Bromhead*, 6 M. & G. 963; S. C., distinguished in *Scotten v. Sutter*, 37 7 Scott N. R. 921.

Mich. 532, per Cooley, J.

(m) 2 Bing. N. C. 761

(l) 1 Bing. N. C. 671. See, also, Wil-

(n) 4 M. & W. 775.

Bryans v. Nix. the facts were, that one Tempany, in Longford, drew a bill of exchange on the plaintiff at Liverpool, against two cargoes of oats, per boats Nos. 604 and 54, represented by two boat receipts or bills of lading, whereby the masters of the boat acknowledged to have received the oats on board, deliverable in Dublin to the plaintiff's agents, for shipment thence to the plaintiff at Liverpool. The plaintiff received, on the 7th of February, a letter from Tempany, dated the 2nd, containing these two boat receipts, dated the 31st of January, and thereupon accepted the bill of exchange which Tempany stated in a letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its cargo, but although the master's receipt for boat 54 was dated on the 31st of January, the loading of it was only begun on the 1st of February, and on the 6th it had received only about 400 barrels out of the 530 barrels called for by the receipt. On that day, the 6th, Tempany, pressed by the importunity of the defendant, to whom he was largely indebted, gave to the defendant an order for both the boat-loads, addressed to Tempany's agent in Dublin, and the latter accepted the order and agreed to forward the cargoes to the defendant in London. The defendant obtained possession of the oats in Dublin, and the plaintiff demanded them from him, and brought action on his refusal to deliver them. The loading of the boat No. 54 was completed on the 9th of February. On these facts, after elaborate argument and time for advisement, Parke, B., delivered the judgment of the Exchequer of Pleas, holding that the property in the cargo No. 604 had vested in the plaintiff, but not the cargo No. 54. In relation to the first cargo, the decision was on the ground that "the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier, and the case resembles that of *Haille v. Smith*, 1 B. & P. 563, where the bill of lading being transmitted for a valuable consideration, operated as a change of property instantan when the goods were shipped; and it is also governed by the same principle upon which I know that of *Anderson v. Clark* (o) was decided, where a bill of lading making the goods deliverable to a factor was upon proof from correspondence of the intention of the principal to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery." In relation to the

(o) 2 Bing. 20.

cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case is submitted in full, because it does not seem altogether reconcilable with the subsequent case of *Aldridge v. Johnson*, *post*, so far as regards the 400 barrels that had actually been put on board, destined for the plaintiff, *before* Tempany was persuaded to give an order for them in favor of the defendant. The learned Baron said (p. 792): "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st of January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no specific chattels which were held for them. The undertaking of the boat-master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property: he might have altered their destination and sold them to any one else: the master's receipt no more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should probably have held that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded, (p) and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him, for such is the effect of the delivery order of the 6th, and the agreement with Walker of the same date,

(p) The reporter's statement, p. 778, is that on the 6th of February, when defendant's agent first pressed Tempany for security, "boat 54 was still in the canal harbor at Longford, partly loaded, the loading having begun on the 1st of February, and about 400 barrels being then on board."

to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory ; on the 9th this appropriation took place by the boat receipt for the 530 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods ; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiffs*, but he did not do so."

§ 495. The difficulty felt in receiving this decision as satisfactory, arises chiefly from the difference between the facts as stated by the reporter and found by the jury, and the facts as assumed in the opinion of the court. The trial at Nisi Prius was before Williams, J., who told the jury to consider, as regards the cargo of No. 54, "whether, although the loading was not complete, the oats to be put on board were *designated and appropriated to the plaintiff*, as if they were, he was of opinion that they were entitled to recover that cargo also." The jury found for the plaintiff, finding also, as a fact, "that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete." But in the opinion of Parke, B., the quantity loaded at the time when Tempany assumed the power of diverting it to a new consignee, is treated as a trifle, "only a small quantity," instead of about three-fourths of the whole as stated by the reporter, and no notice is taken of the ruling of Williams, J., or the finding of the jury, although in some earlier passages of the opinion it is expressly stated to be the law that "if the intention of the parties to pass the property, *whether absolute or special*, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, *employed by the consignor* or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough ; and it matters not by what documents this is effected : nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." The court, however, drew the *legal inference*, notwithstanding the verdict of the jury, that the oats which had been prepared for shipment on No. 54, for which the master had given a receipt in

Remarks on
Bryans v. Nix.

advance agreeing to deliver them to the plaintiff's agent, and of which about three-fourths had actually been put on board before the defendant made his appearance in Longford, *were not received on account of the plaintiff*, and *had not been appropriated to the plaintiff in whole or in part*. In the case of *Aldridge v. Johnson*, (q) as will presently be seen, it was held that where the vendor had filled 155 out of 200 sacks of grain for the vendee, in the vendor's own warehouse, and then emptied them again into the bulk, his election was determined as soon as he had filled each sack, and that the property had passed so far as regarded the 155 sacks. But it is remarkable that in *Bryans v. Nix* there is no suggestion, in the argument or in the decision, that there was any difference in the consignees' rights to the 400 barrels already loaded into the boat and the residue which had not been received by the master in fulfillment of the agreement that he was to deliver them to the plaintiff's agent in Dublin: nor was *Bryans v. Nix* quoted or referred to in *Aldridge v. Johnson*.

§ 496. In *Godts v. Rose*, (r) in 1854, there was a conditional appropriation, which was held not to pass the property, because the vendee had not complied with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, who was the vendor, sent to his wharfinger an order to transfer eleven specified pipes to the purchaser, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment to the buyer, by a clerk, who also took an invoice of the oils, and asked for a check in payment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned to him, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest, the vendor countermanded his order on the wharfinger. The latter, however, thinking that the property had passed, delivered the whole to the purchaser, against whom the action was then brought in trover. All the judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as

Godts v. Rose.
Conditional
appropriation.

(q) 7 E. & B. 885, and 26 L. J., Q. B. (r) 17 C. B. 229, and 25 L. J., C. P. 61. 296.

a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the check, and that he said so at the time.

§ 497. *Aldridge v. Johnson* (s) was decided by the Queen's Bench in 1857. The plaintiff agreed to take from one Knight one hundred quarters of barley, out of the bulk in Knight's granary, at £2 3s. a quarter, in exchange for thirty-two bullocks, at £6 apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which Knight was to fill, to take to the railway for conveyance to the plaintiff, and to place upon trucks free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks to be filled, some of them with his name marked on them. Knight filled one hundred and fifty-five of the sacks, leaving in the bulk more than enough to fill the other forty-five sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. The plaintiff afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again, so as to make it undistinguishable. The action was detinue and trover, against the assignees of Knight for the barley and the sacks. *Held*, that the property in the barley, in the one hundred and fifty-five sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. Campbell, C. J., said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in plaintiff. I conceive there was here an *a priori* assent; not only was there a sale of barley, but it was a sale of part of a specific bulk, which the plaintiff had seen, and he sends the sacks to be filled out of that bulk, and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His Lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle, J., said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the election rested with Knight alone: he had to fill the sacks, which were to be sent to him for that purpose by the vendee, and as soon as he had done an outward act, indicating his election, viz., by fill-

(s) 7 E. & B. 885, and 26 L. J., Q. B. 296.

ing the sacks, and directing them to be sent to the railway, *the property passed.*"

The decision in *Aldridge v. Johnson* was followed by the Exchequer of Pleas, in 1857, in *Langton v. Higgins*,^(t) Langton v. Higgins.
(*ante* § 377.)

§ 498. In 1863, *Campbell v. The Mersey Docks* (u) was decided in the Common Pleas. A cargo of cotton, ex Bosphorus, consisting of five hundred bales, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought two hundred and fifty bales, and sold the remainder to other parties. All had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the 13th of September, a certificate or warehouse warrant was sent to the plaintiff for two hundred and fifty bales, "numbered from 1 to 250, entered by J. P. Campbell, on the 10th of September, 1862; rent payable from the 15th of September." The plaintiff thereupon paid for the two hundred and fifty bales, getting the warrant endorsed to him with a delivery order, "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff resold the cotton, and sent the warrant, endorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the samples. The plaintiff then demanded back the warrant, and was told by the defendants, for the first time, that two hundred of the bales, numbered from 1 to 250, had been inadvertently delivered on the 11th and 13th of September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought suit for the value of the two hundred and fifty bales. On the trial, the defendants insisted that the appropriation by the company, of the two hundred and fifty bales, out of the larger number, was not sufficient to vest the property in those specific bales in the plaintiff, without his assent, and Keating, J., sustained this view. One of the jury then asked his Lordship if the plaintiff's endorsement of the warrant (on the resale) did not amount to such assent, and the learned judge said, it was not conclusive, but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and

(t) 4 H. & N. 402, and 28 L. J., Ex. (u) 14 C. B. (N. S.) 412.
252.

the court refused to order a new trial. Erle, C. J., said: "There certainly was some evidence of appropriation, and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question." Willes, J., also said: "The real question was whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found

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that it was. No property in the goods, therefore, ever vested in the plaintiff." But both the learned judges expressed an extra-judicial opinion upon a point, confessedly "not material," to which attention must be directed. Erle, J., said: "It has been established by a long series of cases, of which it will be enough to refer to *Hanson v. Meyer*, 6 East 614; *Rugg v. Minett*, 11 East 210; and *Rhode v. Thwaites*, 6 B. & C. 688, that the purchaser of an *unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there has been an assent, express or implied, on the part of the vendee.*" Willes, J., assented to this statement of the law, and said: "Perhaps the case of *Godts v. Rose*, 17 C. B. 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance."

Care must be taken not to misconceive the true sense of these dicta. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the vendor is necessary. Willes, J., states this plainly, and Erle, J., says that there must be an assent of the vendee express or implied. This assent is implied, as shown by the language of Erle, J., himself in *Aldridge v. Johnson*, and in several of the cases already quoted, where by the terms of the contract the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made. That this is the real signification of these dicta is also fully shown in the strongly contested case of *Brown v. Hare*, (x) in which the unanimous decision of the Exchequer Chamber was likewise delivered by Erle, J.

(x) 3 H. & N. 484, and 27 L. J., Ex. 822, and 29 L. J., Ex. 6.

372; afterwards in Ex. Ch, 4 H. & N.

§ 499. In this case the defendant, at Bristol, bought from the plaintiffs, merchants of Rotterdam, through their broker, residing at Bristol, "20 tons of best oil, at 47s." The Brown v. Hare. plaintiffs wrote to the broker on the 19th of April that they had secured ten tons for the defendant, deliverable in September, and the defendant wrote back "send them by next steamer." The oil was to be shipped "free on board." On the 7th of September the plaintiffs from Rotterdam wrote to the broker to inform the defendant, which he did, that they had shipped "five tons of rape oil for defendant," and on the 8th they forwarded the invoices and bill of lading. The bill of lading was for delivery to the plaintiffs' "order or assigns," and was endorsed by them on the 8th of September, "Deliver the goods to the order of Hare & Co." (the defendants.) The invoices specified the casks by marks and numbers; and the bill of lading also identified them in the same way. The letter to the broker containing the invoices and bill of lading thus endorsed reached him on the 10th, after business hours, and on the 11th he sent them to the defendant. The ship was actually lost before the documents were received by the broker, and he knew it, but the defendant did not hear of the loss till about two hours after receiving the bill of lading, and he then immediately returned it to the broker. Bramwell, B., dissented from the majority of the court, thinking that there had been no appropriation to pass the property, but Pollock, C. B., delivered the judgment, holding that the property had passed, and that the buyer must bear the loss; on the ground, *first*, that the contract to deliver "free on board" meant that it was to be for account of the defendant as soon as delivered on board; *secondly*, that taking the bill of lading to the shippers' own order, and then endorsing it to the defendant, was precisely the same in effect as taking the bill of lading to the order of the defendant; *thirdly*, that the bill of lading having been forwarded to the broker only that he might get the defendant's acceptance on handing it over, as provided in the contract, this did not prevent the property from passing, the goods represented by the bill of lading being in the same legal state as if in a warehouse, subject to the purchaser's order, but not to be taken by him without payment of the price.

§ 500. In error to Exchequer Chamber, this judgment was unanimously affirmed, the court consisting of Erle, Williams, Crompton, Crowder, and Willes, JJ. Erle, J., in giving the opinion, said, that "The contract was for the purchase of unascertained goods, and the

question has been, when the property passed. For the answer the contract must be resorted to, and under that we think *the property passed when the goods were placed free on board in performance of the contract*. In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, *or on the act of the vendor alone*. If the bill of lading had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he endorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion, it did not, under the circumstances." (y)

§ 501. In *Tregelles v. Sewell*, (z) in 1863, both buyer and seller were residents of London, and the contract was made there. The purchaser bought "300 tons Old Bridge rails, at £5 14s. 6d. per ton, delivered at Harburg, cost freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." *Held*, by all the judges in the Exchequer, and afterwards in the Ex. Ch., that by the true construction of this sale the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser.

The difficulty that sometimes exists in construing contracts involving the subject now under consideration, could hardly be illustrated by a more striking example than the recent

(y) And see *Ogg v. Shuter*, as reported appeal, 1 C. P. D. 47, C. A., and is fully considered, *post* § 562.
 in the Court of Common Pleas, L. R., 10 C. P. 159. The decision was reversed on (z) 7 H. & N. 571.

case of *The Calcutta Company v. De Mattos*, (a) argued by very eminent counsel in the Queen's Bench in Michaelmas Term, 1862, and held under advisement till the 4th of July, 1863, when the judges were equally divided in opinion; Cockburn, C. J., and Wightman, J., differing from Blackburn and Mellor, JJ. When the cause was heard in error in the Exchequer Chamber, (b) the diversity of opinion was still more marked, for while three judges (Erle, C. J., Willes, J., and Channell, B.) concurred in opinion with Blackburn and Mellor, JJ., and one judge (Williams, J.) agreed with Cockburn, C. J., and Wightman, J., two other judges (Martin and Pigott, BB.) differed from both.

§ 502. The facts were these. On the 1st of May, 1860, defendant wrote to the company, proposing to supply them with "1000 tons of any of the first-class steam-coals on the Admiralty list, at my option, delivered over the ship's side at Rangoon at 45s. per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer. Payment of one-half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, and balance by like payment on delivery," &c., &c.

The reply of the 4th of May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option * * * half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month * * * payment one-half of each invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash under discount at the rate of £5 per centum per annum, at your option, and the balance in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and defendant in performance of it chartered the ship *Waban* for Rangoon, the company being no party to the charter, and loaded her with 1166 tons of coal, taking a bill of lading which expressed that the coal was shipped by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid by the charterer as per charter-party. The charter-party stipulated that the freight was "to be paid in London on unloading and right delivery of the cargo at 40s. per ton on the quantity delivered * * * one-quarter by freighter's acceptance at three months, and one-quarter by like acceptance at six months

(a) 32 L. J., Q. B. 322.

(b) 33 L. J., Q. B. 214, in Ex. Ch.

from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination; and the remainder by a bill at three months from the date of the delivery at the freighter's office in London of the certificate of the right delivery of the cargo."

The defendant also effected insurance for £1400 and handed the bill of lading and policy to the company, in pursuance of the contract, together with this letter: "5th of July, 1860. Herewith I hand you Ocean Marine policy for £1400 for this ship, as collateral security against the amount payable by you on account of the invoice order, say £1311 15s., receipt of which please own." The answer acknowledged the receipt of the policy "to be held as collateral security for the payment to you of £1311 15s. on account of the invoice of that shipment."

The invoice value of the coals was £2623 10s., of which the company paid half to defendant on the 5th of July, and the vessel sailed on the 8th, but never arrived at her destination, nor were the coals delivered in conformity with the contract.

§ 503. On these facts it became necessary to decide what was the effect of the contract on the property in the goods, and the right to the price from the time of the handing over the shipping documents and paying half the invoice value.

The opinion of Blackburn, J., was the basis of the final judgment, and was approved by the majority of the judges. It is so instructive on the whole subject, as to justify copious extracts. The learned judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price. See *Dunlop v. Lambert*, 6 Cl. & Fin. 600. If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered

at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See *Dunlop v. Lambert*. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." Referring to the terms of the contract under consideration, the learned judge proceeded to remark: "It is clear that the coals are to be shipped in this country, on board a vessel to be engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. After this he could never have been required nor would he have had the right to ship another cargo for the company; so that from that time, what had originally been an agreement to supply *any* coals answering the description, became an agreement relating to those coals only, just as much as if the coals had been specified from the first. * * *

In construing this contract, the *prima facie* construction is that the parties intended that the *property in the coals vested in the company*, and the right to the price in De Mattos, *as soon as it came to relate to specific ascertained goods*, that is, on the handing over of the documents, and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one-half of the price, the intention that it should only be paid 'on completion of the delivery at

Rangoon,' seems to me as clearly declared as words could possibly declare it, and consequently I think as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos, so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that *the goods were sold and delivered*, though the payment of half the price was contingent on the delivery at Rangoon, and this I think is the true legal construction of the contract."

Wightman, J., was of opinion that on the true construction of the contract the *whole cargo remained the property of the vendor, and at his risk*: that he was bound to deliver the whole at Rangoon, and that the transfer of the policy and bill of lading to the company was a security to protect the company in recovering back their advance of one-half the price in the event of De Mattos' failure to make delivery at Rangoon.

Cockburn, C. J., thought that the *property in the coals passed to the company*, subject to the vendor's lien, for the payment of the price; that the coals, when shipped, were *specifically appropriated* to the company, and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure. But that De Mattos remained bound to make delivery in Rangoon, and by breach of that contract was bound to return the half of the price already paid, and to lose his claim for the remainder.

In the Exchequer Chamber, Erle, C. J., expressed his concurrence with the opinion of Blackburn, J., as to the true meaning and effect of the contract, and Willes, J., and Channell, B., did the same. Williams, J., merely expressed his assent to the views of Cockburn, C. J.

Martin, B., gave his view of the true intention of the parties, without declaring whether and when, if at all, the property passed, but remarked: "I cannot say that I agree with my brother Blackburn's judgment:" and Pigott, B., expressed his concurrence with the interpretation of the contract by Martin, B.

§ 504. In *Jenner v. Smith*, (c) where the sale was made by sample, and was of two pockets of hops out of three that were lying at a specified warehouse, the vendor instructed the ware-

*Jenner v.
Smith.*

(c) L. R., 4 C. P. 270.

houseman to set apart two out of the three pockets for the purchaser, and the warehouseman thereupon placed on two of them a "wait-order card," that is a card on which was written, "to wait orders," and the name of the vendee: but no alteration was made in the warehouseman's books, and the vendor remained liable for the storage. The vendor then sent an invoice with the numbers and weights to the buyer of these two pockets, with a note at the foot, "The two pockets are lying to your order." *Held*, that the property had not passed, because the buyer had not made the vendor his agent for appropriating the goods to the contract, nor abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

In *Ex parte Pearson*, (d) the purchaser had ordered and paid for the goods, and the company loaded the goods on a railway to his address, and sent him the invoice *after* the presentation of a petition for winding up the company, but *before* order made, and it was held that the property had passed to the purchaser and could not be taken by the official liquidator as assets of the company.

Ex parte Pearson.

§ 505. Before leaving this branch of the subject, it is well to notice that the property does not pass even when the vendor has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods than those ordered, and throw the selection on the purchaser.⁴ Thus in *Cunliffe v. Harrison*, (e) it was *held* that where an order was given for ten hogsheads of claret, and the vendor sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract, and thus no property had passed. And in *Levy v. Green*, (f) the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware tea-pots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. In the court below, (g) there was an equal division of the judges, Lord Campbell and Wight-

Vendor's election must be in conformity with the contract.

Cannot elect more than contract requires and leave buyer to select.

Cunliffe v. Harrison.

Levy v. Green.

(d) 3 Ch. 443.

(f) 1 E. & E. 969, and 28 L. J., Q. B.

4. See American decisions, *post* § 531.

319; *Tarling v. O'Riordan*, 2 L. R., Ir.

(e) 6 Ex. 903. See, also, *Hart v. Mills*,

82, C. A.

15 M. & W. 85, and *Dixon v. Fletcher*, 3 M. & W. 145.

(g) 27 L. J., Q. B. 111.

man, J., holding that the defendant had a right to reject the whole on account of the articles sent in excess, and Coleridge and Erle, JJ., being of a different opinion; but in the Exchequer Chamber, Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding with Lord Campbell, and Wightman, J., that the property had not passed, and that the purchaser had the right to reject the whole.

§ 506. [In *Gath v. Lees*, (h) the defendants agreed to buy from the plaintiff cotton "to be delivered at seller's option in August or September, 1864, payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendants that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated from that day. And it was held that the plaintiff, having exercised his option, was bound to deliver the cotton in August; and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton. Martin, B., saying during the course of the argument: "The seller could not give two notices. When the notice was given, *the buyer was bound to be ready with the money, which he might have had difficulty in getting*; then is the seller to say, 'I will not deliver the cotton according to my notice, but will put you off until next month.'"]

§ 507. But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, does not prevent the vendor from afterwards, within the time limited for so doing, appropriating and tendering other goods which are in accordance with the contract.

This was decided in *Borrowman v. Free*, (i) where the plaintiffs, being bound by contract to tender a cargo of maize to the defendants, tendered a cargo which was rejected by the defendants, as not being in accordance with the contract, and afterwards and within the time limited for so doing the plaintiffs tendered a cargo which was in accordance with the contract, and it was held, that this second tender was good, and that the defendants were bound to accept it. *Gath v. Lees* was distinguished upon the grounds that there the seller's option was exercised in a proper manner, and that the purchasers, acting upon the vendor's notice, had altered their position for the worse. Brett, L. J.,

Right of the seller when the buyer has rejected the first goods appropriated as not in accordance with contract, to make a subsequent appropriation within the contract time.

Borrowman v. Free.

(h) 3 H. & C. 558.

(i) 4 Q. B. D. 500, C. A.

observes, (k) "I have only to add that a different rule might have been applied *if the defendants had accepted the cargo of the Charles Platt* (the cargo which had been first tendered.) It is possible that the tender of the plaintiffs could not in that case have been withdrawn. I wish it, however, to be understood that this is a point upon which I express no opinion."]

§ 508. The decisions as to subsequent appropriation in cases where the agreement was for the delivery of a chattel to be manufactured begin with *Mucklow v. Mangles*, (l) in 1803. Pocock ordered a barge from one Royland, a barge-builder, and advanced him some money on account and paid more as the work proceeded, to the whole value of the barge. When nearly finished, Pocock's name was painted on the stern, but by whom and under what circumstances is not stated in the report. The barge was finished and seized on execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. Held, that the property had not passed, Heath, J., saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of the goods so sold." 5

Subsequent
appropriation
of chattel to
be manu-
factured.

*Mucklow v.
Mangles.*

§ 509. In *Bishop v. Crawshay*, (m) it was held by the Queen's Bench, in 1824, that no property passed to the defendant in goods which he had ordered from a manufacturer in the country, and on account of which he had accepted a bill of exchange for £400. The manufacturer had received the order on the 26th of January, had committed an act of bankruptcy not known to the defendant on the 5th of February, and on the 6th drew the above-mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and on the 15th a commission issued against the bankrupt, by whose assignees the action of trover was brought. Holroyd, J., said: "The goods were made, but until the money paid was appropriated to these particular

*Bishop v.
Crawshay.*

(k) At page 505.

(l) 1 Taunt. 318.

5. See American decisions, *post* § 536.

(m) 3 B. & C. 415.

goods the defendant could not have maintained trover for them, if they had been even sold to another person."

§ 510. In *Atkinson v. Bell*, (n) already fully explained (*ante* § 99,) the purchaser had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the vendor had written to ask the purchaser by what conveyance they were to be sent, but had received no answer, when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods *bargained and sold*, this form of action not being maintainable where the property has not passed. *Held*, that the form of action was misconceived; it should have been for not accepting the goods: the property had not passed, for although the vendor *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another at any time before the buyer assented to the appropriation. This is perhaps the strongest case in the books on this subject, for the conduct of

Remarks on
this case.

the vendor was as near an approximation to a determination of election, without actually becoming so, as one can well conceive. It is distinguishable from *Fragano v. Long* (o) only on the ground that in this latter case the order was to *despatch* the goods for the buyer's account, and when the goods were despatched it was really the act of the buyer through his agent the seller, and this act of the buyer constituted an implied assent to the appropriation made by the seller, which then became no longer revocable. In *Atkinson v. Bell* this element was deficient. But there was another circumstance in that case, adverted to in the judgment of the court, which renders it almost impossible to distinguish it from *Rohde v. Thwaites*. (p) The defendant had made Kay his agent to *procure the machines*; and the report states that they were altered so as to suit Kay, and then packed up by *Kay's directions*, which is equivalent to their being packed up by the buyer's own directions; and surely if the buyer, after goods have been completed on his order, is informed by the seller that they are ready for him, and then examines and directs them to be packed up for him, this constitutes as strong an assent to the appropriation as was given by the purchaser in *Rohde v. Thwaites*, when he said, without seeing the sugar that had been packed up for him, that he would send for it.

(n) 8 B. & C. 277.

(o) 4 B. & C. 291.

(p) 6 B. & C. 388.

Many attempts have been made to reconcile *Atkinson v. Bell* with the principles recognized in the other cases on the subject, but it is very difficult to avoid the conclusion that a conflict really exists, and that if correctly reported, the case would not *on this particular point* be now decided as it was in 1828.

§ 511. In *Elliott v. Pybus*, (q) in 1834, a machine was ordered by defendant, and he deposited with plaintiff £4 on account of the price. When completed, he saw it, paid £2 more on account, but made no final settlement. In reply to a demand for £10 19s. 8d., the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. This was *held* an assent to the appropriation, and a count for goods bargained and sold was maintained.

The cases in relation to the appropriation of an unfinished chattel, paid for by installments during the progress of the work, have already been examined in Chapter III. of this Book, § 382.*

*Elliott v.
Pybus.*

Appropriation
of chattel dur-
ing progress of
manufacture.

AMERICAN DECISIONS.

§ 512. The decisions in the United States are in substantial accord with the law of England, as stated by our author. There are, however, two points of difference. Where the seller is to make the appropriation, some American cases hold that he may satisfy the contract by tendering a greater quantity from which the buyer must select, provided the mass does not vary in quality. This is a sequence from the principle of *Kimberly v. Patchin*, and kindred decisions discussed in the last chapter.

The second point of difference relates to chattels made to order. The weight of American authority sustains the proposition that when the manufacturer has finished a chattel according to order, and set it apart for the buyer, the property is at the buyer's risk, and he becomes liable for the price, though he has not accepted the chattel, or has refused to accept it. In England title does not, in general, pass until acceptance, and the manufacturer's only remedy for refusal to accept is for damages for non-acceptance. The decisions upon these points are stated *post* §§ 531-538.

§ 513. The appropriation of goods to the contract upon which the

(q) 10 Bing. 512.

* The rest of this chapter is by the American editor.

property passes, although usually by act of the seller, may by the terms of the contract require an act of the buyer. An illustration of this may be found in the case of the *Inhabitants of Westfield v. Mayo*.⁶ A person was injured in the street by the falling of a pile of brick placed on a lot, to be used in the erection of a building, and the question arose who was the owner of the brick, in order to determine who must answer for the injury. It appeared that the brick were delivered and piled by the builder, under a contract with a mason, whereby the mason was to pay to the builder \$11 per thousand, to be furnished as fast as required for the building, and was to receive from him \$17 per thousand brick laid. Under this contract the court held that no property in any of the brick passed to the mason until he used them in the wall.

§ 514. In *Pfistner v. Bird*,⁷ the sale was of all the pine trees which the buyers might choose to take from certain land for three years, at a certain price per thousand. The land-owner afterwards taking away all the pine, the buyers brought trespass, but it was held that they could not recover. "Until cut, they had no title to any of the pine."

In *Brewer v. Mich. Salt Assoc.*,⁸ a salt manufacturer agreed to deliver all salt manufactured by him to an association, to become its property as soon as inspected and branded, and to be delivered when sold by the association, but if not delivered, the manufacturer to pay ten cents per barrel liquidated damages, the manufacturer to be responsible for the salt until delivery. A quantity of salt was inspected and branded, but before removal it was destroyed by fire. This was held to be the buyer's loss, title having passed when branded, the provision that the seller should be responsible for the salt, meaning only for lack of a bailee's ordinary care.

§ 515. The contract may place the authority to make the appropriation in the hands of a third party. Thus in *Records v. Philadelphia R. R.*,⁹ the seller contracted to supply 100,000 feet of poplar lumber, part of which was in the possession of the seller, and the rest of which he was to procure. The whole was to be inspected and classified according to quality by an inspector named. Under this agreement a lot of 78,000 feet was inspected and taken by the buyer, who tendered the price. The seller being dissatisfied with the inspection, refused the tender and brought

Appropriation
by act of a
third person.

6. 122 Mass. 100.

7. 43 Mich. 14.

8. 47 Mich. 526.

9. 9 Phila. 55.

trover. Briggs, J., said that as long as the buyers were willing to accept the part inspected, the fact that the residue contracted for had not been furnished would not prevent title from passing, and cites *Rugg v. Minett*, 11 East 209, and *Aldridge v. Johnson*, 7 E. & B. 896. "Applying the doctrine of these cases to the one under consideration, it seems clear that the lumber inspected became appropriated to the contract, and title to it thereupon passed, *eo instanti*, to the vendees. And why should the fact that but a part of the whole had been inspected affect the purchasers' right to so much, if they assent to receive it? The delivery of the balance is a duty imposed upon the plaintiffs, and their refusal to furnish it should not affect the right of the vendees."

In *Iron Cliffs Co. v. Buhl*,¹⁰ on a contract to deliver 2000 tons of iron ore at a certain point, to be taken away by rail, the miner delivered that amount, together with a quantity for another buyer, all in one pile. Part of it was delivered by the railroad company; the rest, through some mistake of the company, never reached the buyer, and he sued to recover back the price he had paid. The court held that the delivery, though in a mass with other ore of the same quality, was sufficient, the parties evidently contemplating that the railroad company would make the separation and take away the required quantity.

§ 516. The appropriation in most executory contracts of sale is by act of the seller, usually manifested by a delivery of the goods to the buyer or to a carrier, to be transported to him. In either case the property passes when the goods are placed beyond the seller's control.

Appropriation
by act of the
seller.

In *National Bank v. Dayton*,¹¹ one Bramel being indebted to a bank, agreed to deliver 500 cords of wood at the yard of a railroad company, the company agreeing to receive it and pay the bank \$5 per cord. Bramel delivered 375 cords of wood at the yard, when it was attached by his creditors, and the bank replevied it from the sheriff.

10. 42 Mich. 86.

11. 102 U. S. 59. See, also, *Whitcomb v. Whitney*, 24 Mich. 436; *Valentine v. Brown*, 18 Pick. 549; *May v. Hoaglan*, 9 Bush 171; *Stokes v. Recknagel*, 38 N. Y. Super. 368; *Reeder v. Machin*, 57 Md. 56; *Thompson v. Conover*, 32 N. J. L. 466; *Randolph Iron Co. v. Elliott*, 34 N. J. L.

184; *Home Insurance Co. v. Heck*, 65 Ill.

111; *Hyde v. Lathrop*, 2 Abb. App. Dec. 436; *Wing v. Clark*, 24 Me. 366; *Sprague v. King*, 1 P. & B. (N. B.) 241; *West v. Rutledge*, 1 Id. 674; *Butters v. Stanley*, 21 U. C. C. P. 402; *Robertson v. Strickland*, 28 U. C. Q. B. 221.

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The title of the bank was sustained. Harlan, J., said: "The transaction constituted a sale to the bank of all the wood which Bramel delivered at the yard of the company. The absolute title to it passed to the bank upon his depositing it there, with the intention or for the purpose of completing the sale."

§ 517. When goods of a certain character are ordered, and the buyer directs that they be sent to him by a common carrier, or

*Appropriation
by delivery to
a carrier.*

where, from the course of trade, delivery to a common carrier, to be sent to the buyer, is the evident intent, in such cases the property passes as soon as the goods are put in the carrier's possession. From this rule of law has resulted the general proposition that when goods are consigned the consignee is presumed to be the owner in the absence of proof to the contrary.

In the *Mary and Susan*,¹² a vessel was captured having on board goods claimed by an American citizen, but which the captors claimed were the property of a British merchant, and therefore of an enemy. The goods were bought in England on the order of merchants in New York, were stored in Liverpool to await an opportunity to ship, and were shipped on the revocation of the British orders in council. Marshall, C. J., said that the court was inclined to the opinion that the goods became the property of the New York merchants on being stored in Liverpool. At all events "the delivery on board the ship was a delivery to them; the property was vested in them by that act, and they had no election to accept or reject it."

§ 518. In *Griffith v. Ingledew*,¹³ copper was shipped at Liverpool to a merchant in Philadelphia, who brought suit against the shipowner for damages to the copper in transit. Tilghman, C. J., giving the opinion of the court, said: "If A sells goods to B, and delivers them to a carrier by order of B, the right of action against the carrier is in B, because the delivery to the carrier vests the property completely in B. So the delivery of the bill of lading vests the property in the consignee." In *Lawrence v. Minturn*,¹⁴ the same question arose. Curtis, J., cited *Griffith v. Ingledew*, and said that even if it is admitted that the carrier cannot be sued by a consignee having no interest in the goods, still "a presumption of such interest in the consignee arises from a bill of lading which makes the goods deliverable to him."

12. 1 Wheat. 25.

13. 6 S. & R. 429.

14. 17 How. 100, 107.

§ 519. In *Grove v. O'Brien*,¹⁵ it appeared that O'Brien, a worker in iron, was indebted to three creditors—Gilmor, Fowle and Grove. He placed 500 kegs of nails on a boat and consigned them to Fowle for the use of Gilmor. They were attached by Grove, and claimed by each of the three creditors. The court held that by the delivery to the master, and the bill of lading taken in the name of Gilmor, the title passed to Gilmor.

In *Blum v. The Caddo*,¹⁶ it was held that the seller of goods on credit, having delivered them to a carrier to be taken to the purchaser, had parted with title and could not sue the carrier for their loss.¹⁷

§ 520. In *Schmertz v. Dwyer*,¹⁸ a merchant in Brazil sent an order to dealers in Pittsburgh for an assortment of lamps and oil to the amount of \$1000, to be sent by sailing vessel at first opportunity. The sellers selected oil and lamps to the amount named, and sent them to New York to be shipped; and they forwarded on invoice to the buyer, but after some months' delay, no vessel being found to take the goods to Bahia, the sellers ordered the goods sold, and received the proceeds. The goods had greatly advanced in value. The buyer sued for damages and his action was sustained, the court holding that upon the shipment at Pittsburgh title passed to the buyer.

In *Waldron v. Romaine*,¹⁹ a merchant in Canada bought groceries in New York and gave directions that they should be forwarded by a certain line. They were so forwarded, but were delayed at Oswego for non-payment of duties, and burned there. It was held to be the buyer's loss.

§ 521. In *Frank v. Hoey*,²⁰ a Boston liquor dealer employed an

15. 8 How. 429, 438.

16. 1 Woods 64.

17. See, also, *The Vaughn and Telegraph*, 14 Wall. 258, 266; *Lawrence v. White*, 5 McLean 108; *Low v. Andrews*, 1 Story 38. In *Fenton v. Braden*, 2 Cranch C. C. 550, goods were ordered from a foreign merchant and shipped by him to the buyer, with an invoice showing price, which had not been agreed upon. The buyer received the goods and was sued for the invoice price, but the court held that the title had passed to him when shipped, and he must pay the

value of the goods at the time and place of shipment, but not the invoice price.

18. 53 Penna. 335. See, *Morberger v. Hackenberg*, 13 S. & R. 26; *Cooper v. Altimus*, 62 Penna. 486; *Schumacker v. Ely*, 24 Penna. 521.

19. 22 N. Y. 386. To the same effect, see *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Pierson v. Werhan*, 14 Hun 626; *Krulder v. Ellison*, 47 N. Y. 36; *Pacific Iron Works v. Long Island R. R.*, 62 N. Y. 272.

20. 128 Mass. 263. See *Orcutt v. Nelson*, 1 Gray 536; *Stevens v. Boston and*

agent to solicit orders, subject to the dealer's approval, and on an order from a person in Natick sent him a quantity of liquor delivered to the express in Boston. On a suit for the price the defence was that the sale was illegal, the seller being licensed to sell in Boston and not in Natick. Ames, J., said: "In such a case, unless some special agreement to the contrary appeared, delivery to the carrier in Boston would be delivery to the purchaser."

§ 522. In Wisconsin the subject of appropriation by delivery to a carrier was considered in *Ranney v. Higby*.²¹ In that case a merchant in Milwaukee ordered a quantity of salt from a merchant in Buffalo, to be sent by a vessel on the lakes, and he added, "Do the best you can in freight contract and advise me. Get it insured for your benefit if lost." The salt was shipped, consigned to the Milwaukee merchant, but part of it was lost on the way in a storm. The Buffalo merchant brought suit for the price, but was nonsuited. On error the nonsuit was reversed. Cole, J., said: "It seems to be the ordinary case of sale and delivery of goods by the vendor to a master of a vessel to be carried to the purchaser. The sale and delivery were unconditional, and the property became absolutely the defendant's." As to the order to seller to insure, the court said it was for the defence to show if the seller had insured and received the insurance money. If he had neglected to insure, he might perhaps be liable for neglect, but that did not affect the question whether title had passed.

When the case came before the court for a new trial, defendants proved that the salt had been insured by the seller; that on shipment of the goods he had drawn on them for part of the price, and in a letter notifying them of the draft, he said: "Should the salt now on the way to you be lost, we will look to the insurance company for the amount, and the paper may be returned." The salt being lost, the seller procured a draft accepted by the insurance company and endorsed it to the buyer, but the company failed before the draft came due. The jury found for the defendant again, but on second writ of error the court reversed the judgment on the ground that the judge at circuit

Worcester R. R., 8 Gray 262; *Claffin v. Boston, &c., R. R.*, 7 Allen 341; *Stanton v. Eager*, 16 Id. 467; *Finch v. Mansfield*, 97 Mass. 89; *Kline v. Baker*, 99 Id. 253; *Johnson v. Stoddard*, 100 Id. 306; *Merchants' National Bank v. Bangs*, 102 Id. 291; *Clough v. Whitcomb*, 105 Id. 482; *Odell v. Boston and Maine R. R.*, 109 Id. 50, stated *ante* § 421; *Lynch v. O'Donnell*, 127 Id. 311.
21. 4 Wis. 174.

did not interpret the contract, but left it to the jury. And the court interpreted the letter as to insurance to mean only that the seller, in case of loss, would collect the insurance and credit it on the price. A third trial resulted again in favor of the defendant, the court refusing to direct a verdict for plaintiff, and this judgment was again reversed. A fourth trial resulted in a fourth verdict for defendant, and the judgment was a fourth time reversed, on new grounds, and the case then disappears from the reports.

In further illustration of the principle that in the absence of proof to the contrary, the consignee of goods in transit is presumed to be the owner of them, see the cases cited in the note. 22

§ 523. But the title does not pass until the goods are completely within the possession of the carrier.

In *Wenger v. Barnhart*,²³ flour was bargained for to be delivered at a railroad station, and sent to Philadelphia. After it had been loaded upon a car, and the clerk of the warehouse had entered it in the name of the buyer as consignee, but before the car had been closed, the seller ordered the flour shipped in his own name, which was done, and the entry was corrected accordingly. The buyer brought trover for the flour. It was held that title did not pass until the flour had passed wholly out of the power of the seller into the possession of the railroad company, and whether it had so passed was a question for the jury.

Delivery to the carrier must be complete.

In *Glass v. Goldsmith*,²⁴ grain was weighed into cars in a warehouse, transported to a dock and there loaded into a vessel. It was held that the fact that an officer of the vessel tallied each car in the warehouse, did not constitute a delivery there of the grain to the ship-

22. *Watkins v. Paine*, 57 Ga. 50; opinion. See *Rodgers v. Phillips*, 40 N. Divesey v. Kellogg, 44 Ill. 114; *Stafford* Y. 519, and see *ante* § 161, note 12.) *Barry v. Palmer*, 19 Me. 303; *Torrey v. Corliss*, 33 Me. 333; *Woolsey v. Bailey*, 27 N. H. 217; *Smith v. Smith*, 27 N. H. 244; *Garland v. Lane*, 46 N. H. 245; *Arnold v. Prout*, 51 N. H. 587; *Armentrout v. St. Louis, &c.*, R. R., 1 Mo. App. 168; *Walker v. The State*, 9 Tex. App. 39; *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 13 R. I. —; *Hobart v. Littlefield*, 13 R. I. —.

23. 55 Penna. 300.

24. 22 Wis. 488.

master, and that his responsibility only began when they reached the vessel.

§ 524. Where goods are consigned to one who has not ordered them, or agreed to take them, it is manifest that ordinarily title will not pass until they have been accepted by him, for want of that mutual assent which is essential to every sale. See *ante* § 38 and notes. But where a shipment is made to a creditor with a view to the application of the proceeds of the property to the debt, under a general arrangement for that purpose, the question whether title will pass or not is one of difficulty, and the cases differ.

In *Elliott v. Bradley*,²⁵ the owner of goods consigned them to his factor, to whom he was indebted, but before either the goods or any order or receipt for them reached the factor, they were attached in transit by the creditor of the shipper. This attachment was sustained, the court holding that while in transit the goods remained at the risk and under the control of the shipper. This is a questionable case, and has been considered overruled by *Davis v. Bradley*.²⁶ In that case, however, the consignee accepted drafts on the faith of the particular consignment, and received receipts, and this was held to distinguish the case from *Elliott v. Bradley*.

§ 525. These Vermont cases were considered, and *Elliott v. Bradley* was approved and followed by the Supreme Court of Iowa, in *Hodges v. Kimball*.²⁷ In that case five car loads of grain were consigned by rail to a consignee to whom the consignor was indebted, but before the cars were removed from the station where loaded, the grain was attached by a creditor of the shipper. This was held a good attachment, because the receipts had not been sent to the consignee at the time of the attachment. This case is supposed by Day, J., giving the opinion, to be supported by *Bank of Rochester v. Jones*,²⁸ but it is not, for the latter case was one of delivery subject to the payment of certain drafts, and title was reserved to secure such payment. He also cites *Bonner v. Marsh*.²⁹ In that case the court says that the

25. 23 Vt. 217.

26. 28 Vt. 118.

27. 49 Iowa 577.

28. 4 N. Y. 497.

29. 10 Sm. & M. 376. To the same effect see *Woodruff v. Nashville, &c., R. R.*, 2 Head 87; *Saunders v. Bartlett*, 12

Heisk. 316, *Oliver v. Moore*, 12 *Heisk.* 482. In these Tennessee cases the title of an attaching creditor of the consignor was preferred to that of the consignee, although the consignee had received the bill of lading and paid freight, and made advances on the property.

question whether property shall pass is one of intent. If the goods are consigned under a contract of sale, the property passes by delivery to the carrier with a bill of lading to the buyer, but if there be no contract of purchase the shipper's title will not be divested, and though the consignee is a creditor of the shipper, he still acquires no interest in the goods, but only in the proceeds of sale. Until the goods reached the consignee they were liable to attachment by the shipper's creditors.

§ 526. In contrast with these decisions is the case of *Strauss v. Wessel*.³⁰ In that case the consignor sent a car-load of pork to his creditor, writing at the same time, "we deliver you this load on our indebtedness," and inclosing invoice, but keeping the bill of lading, which named the creditor as consignee. The property was attached in transit by a creditor of the consignor. The consignee replevied. Scott, J., said: "The relation of the parties to this shipment differed in no substantial respect from that of the case in which goods are shipped by a vendor to a purchaser who has previously ordered and paid for them. And in such case, it is well settled that the delivery of goods to a common carrier for conveyance to the purchaser, is equivalent to a delivery to the purchaser himself. The carrier is, in that case, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent." This view best accords with the authorities.³¹

§ 527. An unauthorized delivery to a carrier will not pass the property. In *Hague v. Porter*,³² a merchant in Newark ordered 100 lamps from a merchant in New York. They were sent by a carman, but the Newark merchant refused to receive them, and they were left on the sidewalk. The seller sued for the price. Cowen, J., said that the suit should be for not accepting, the buyer not having directed the goods sent by carrier. "Such direction may certainly be implied from the course of trade, but I do not see here any direction so to send, either express or implied."

Unauthorized
delivery to a
carrier.

§ 528. The delivery to the carrier must be with ordinary care, to secure safe carriage and delivery to the buyer. Thus, a misdirection, whereby the goods are lost, will prevent the property from passing.³³ It would seem that the consignor should

Misdirection.

30. 30 Ohio St. 211.

Loyd v. Wight, 20 Ga. 574; Hanauer v.

31. See *Dows v. Cobb*, 12 Barb. 310; *Gibson v. Stevens*, 8 How. 384, 397; *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70, 74.

Bartels, 2 Col. 514.

33. *Woodruff v. Noyes*, 15 Conn. 334; *Garretson v. Selby*, 37 Iowa 523, and cases cited.

32. 3 Hill 141. To the same effect, see

give notice of the shipment in order that the consignee may be on the lookout for the goods. But in *Crook v. Cowan*,³⁴ an order was sent by mail for carpets, to be sent by express. After some days' delay they were sent, but the buyer having written and telegraphed in the interim to learn whether his order would be filled, and having received no reply, bought other carpets, and refused to receive those he had ordered. The court held (Rodman, J., dissenting) that he was liable for the price. This was followed in *Ober v. Smith*,³⁵ where guano was ordered and shipped, but never reached the buyer, who was not notified of the shipment. If he had been notified he would probably have received it. A suit for the price was sustained. Faircloth, J., said: "The non-delivery was not owing to the negligence of the plaintiffs, and was probably occasioned by the fault of the carrier. It is contended, however, that the plaintiffs cannot recover, because they sent no bill of lading to the defendant. Such bills are not essential in contracts of sale and delivery like the present." Rodman, J., dissented, holding that the offer should have been accepted and the assent signified in a reasonable time, and that mere shipment of the goods was not such assent until the article was received and the assent thereby communicated, and until received the risk of loss was the shipper's. The dissent is based on the further ground that the vendor had neglected to take due precautions for safe delivery, and *Clarke v. Hutchins*, 14 East 475, is cited. The dissenting opinion is an able one, and in view of the decisions that it is essential to a contract of sale that the assent to an offer should be *communicated*, will probably be preferred to the opinion of the court.³⁶

§ 529. An appropriation of goods not according to contract will not pass the property unless the buyer accepts them.³⁷ This is illustrated by the case of *Gardner v. Lane*.³⁸ In that case the contract was to deliver 135 barrels of No. 1 mackerel in payment of a debt. Being pressed to make delivery, the seller went with the buyer to a shed and counted out 85 barrels from a large lot, supposed to be all No. 1, but in fact 46 barrels were No. 3. They then went to a store and counted off from a large number two rows of barrels, 48 in number, supposed to be mackerel, but in fact

34. 64 N. C. 743.

35. 78 N. C. 313.

36. See *ante* § 38, note 3, and *post* § 532.

Craig v. Harper, 3 Cush. 158, 160.

37. *Diveasy v. Kellogg*, 44 Ill. 114;

Wolf v. Dietzsch, 75 Ill. 205; *Ellis v. Roche*, 73 Ill. 280; *Brown v. Berry*, 14

N. H. 459; *Brown v. Foster*, 113 Mass.

136; *Zaleski v. Clark*, 44 Conn. 218.

38. 9 Allen 492.

containing only salt. Before they were removed, they were attached for a debt of the seller. The buyer replevied. The judge charged the jury that the buyer, finding that the goods were not as agreed, might return or keep them at his option, and the jury found for the buyer. But on exceptions this verdict was set aside. Bigelow, C. J., said: "Where parties to a contract of sale agree to sell a certain kind of property not yet ascertained, distinguished or set apart, and by mistake a delivery is made of articles differing in their nature from those agreed to be sold, no title passes. They are not included within the contract of sale—the vendor has not agreed to sell nor the vendee to purchase them; the subject matter has been mistaken, and neither party can be held to a contract to which he has not given his assent." Referring to cases cited by counsel, he said that in those cases there was no mistake concerning the goods, the mistake was only as to the quality of the article. "The error at the trial consisted in losing sight of the distinction between cases of this character and the one at bar; between an agreement to sell a specified article, concerning the quality of which the parties were mistaken, and an agreement to sell one article, and a delivery by mistake of a wholly different article. In the former the title passes at the election of the vendee; in the latter it does not." It was therefore held that the property in the No. 1 mackerel, only, passed.

§ 530. On the new trial the buyer offered to prove that the seller knew the contents of the barrels, and that therefore the case was one of fraud and not mistake, but the court held that this did not alter the case, unless the buyer, on discovery of the fraud, assented to receive the articles delivered, and that was not the case before the court; and this was sustained on exceptions.³⁹ On this judgment the attaching creditor abandoned all claim to the No. 1 mackerel, and asked that the salt and No. 3 mackerel should be delivered to the attaching officer, and such order would have been made, but that it then appeared that the writ of attachment had never been entered in court, and thereby the attachment was dissolved. In this state of affairs the judge at circuit ordered an issue to try the question, whether the seller falsely and fraudulently sold and delivered the salt and the No. 3 mackerel as No. 1 mackerel, and the jury finding that he did, the court ordered judgment for the buyer (plaintiff in replevin) for all of the mackerel and salt. On exceptions this judgment was sustained.⁴⁰ Chapman, J.,

39. 12 Allen 39.

40. 98 Mass. 517.

said: "The plaintiff sued out the writ of replevin, describing the property as No. 1 mackerel. When the officer took it, the plaintiff discovered that a part was salt and a part No. 3 mackerel. He then altered his writ, and described the property correctly as salt and No. 3 mackerel. This was an election to take the property as it was. Against the fraudulent vendors, this election to take the property was valid. A fraudulent vendor cannot reclaim property sold by him, because it is not what he represented it to be. And the vendee may keep it if he will, and sue for damages."

§ 531. Where the seller delivers a greater amount of the article ordered than the buyer has ordered or agreed to receive, the buyer may repudiate the whole, and if he accepts part he will be liable to pay for so much only as he takes.

Delivery of more than contract requires.

But in some cases where selection is not material, the bulk being uniform in quality, the course of trade warrants a tender of a larger quantity than that purchased, from which the buyer is bound to take the portion bought by him. The most frequent cases of such appropriation are those of a certificate entitling the buyer to a certain quantity of grain or oil out of a mass. See last chapter, § 477, *et seq.* 41

In *England v. Mortland*,⁴² the agreement was to deliver 1000 cords of wood on the river bank for \$3 per cord. There was piled on the bank a greater quantity than that required, and the owner made sales therefrom to various purchasers. The buyer took part of the quantity for which he had bargained from the pile, but refusing to take the rest was sued for the price, on a count for goods sold and delivered. The seller obtained a verdict, but it was set aside on appeal. *Hayden, J.*, said: "According to the respondent's showing, the appellant had no greater right in the wood than any person who by chance wished to buy. To whatever refinement the doctrine of constructive delivery may be pushed, it cannot enable a vendor to assert and deny his ownership over the same property at the same time."

§ 532. In *Rommel v. Wingate*,⁴³ the order was for 375 tons of coal to be shipped immediately. The coal was not shipped until after 10 days, (the delay being without fault of the seller) and the quantity shipped was 392 tons. The buyers refused to receive it, and were sued for damages for non-acceptance. *Morton, J.*, said that the contract

41. See, also, *Hutchinson v. Commonwealth*, 82 Penna. 472, 482; *Wilkinson v. Stewart*, 85 Penna. 255; *Smith v. Friend*, 15 Cal. 124; *Iron Cliffs Co. v. Buhl*, 42

Mich. 86.

42. 8 Mo. App. 490.

43. 103 Mass. 327, 330.

bound defendants to receive 375 tons at once. "It did not bind them to take a larger cargo, or one which could not be shipped substantially as speedily as proposed by the plaintiff in his letter. If, by a change of circumstances, the plaintiff was unable to comply with this order of the defendants, he should have so informed them. He had no right to substitute a larger cargo, deliverable at a more remote time, in place of the cargo ordered by the defendants."

§ 533. In *Barton v. Kane*,⁴⁴ the order was for 5000 cigars, and the seller sent 5625, writing, "I send you a few more than ordered so as to fill the case." The buyer refused to receive them, objecting to the quality, and stored them away for the seller, and they were destroyed by fire. The seller sued for the price and obtained a verdict. On appeal it was set aside, and the court held that a nonsuit ought to have been granted. Dixon, C. J., said: "The order was for 5000, but the plaintiff sent 5625. This was no compliance with the order, and imposed no obligation on defendant, without showing an acceptance in fact by him after the cigars were received, the burden of which was upon the plaintiff. To constitute a delivery to the carrier, a delivery to the consignee, so as to pass the title, the goods must correspond in quantity as well as quality with those named in the order." Whether the buyer on receiving the goods is bound to give notice of his objections, or otherwise be deemed to have waived them and accepted the goods, was considered and not decided, but on a later appeal in the same case it was intimated that failure to give notice of objection was equivalent to an acceptance.⁴⁵

§ 534. In *Downer v. Thompson*,⁴⁶ on an order for 250 barrels of cement, 260 were sent by boat. The buyer refused to take them from the boat, objecting solely on the ground of quality. On a suit for the price, a nonsuit was granted and sustained in the Supreme Court,⁴⁷ because the delivery was of too much. But this was reversed in the Court of Errors and Appeals, because the seller claimed only the price for 250 barrels, and there was evidence that he intended only to answer the order for that number by delivering more. "An over-performance could only be beneficial to defendant. If the rule be rigid that no more shall be delivered than was contracted for, then the least overplus must vitiate the delivery. But if some latitude is to be allowed for the sake of abundant caution,

Waiver of objection to excessive delivery.

44. 17 Wis. 38, 45.

45. 18 Wis. 262.

46. 6 Hill 208.

47. 2 Hill 187.

who is to decide how much excess there may be without vitiating the delivery? This is a question for the jury alone to decide." It was further held that by objecting solely on the ground of quality, the buyer waived any objection arising from excess of number.⁴⁸

In *Larkin v. Mitchell*,⁴⁹ the order was for 500,000 shingles. These were sent, and 160,000 more. The buyer took the amount of his order and refused to receive the rest, except to sell on commission. They were burned, and it was held the seller's loss.

§ 535. If only part of the goods ordered are sent, the title will not pass to the buyer unless he accepts them. He may, however, be deemed to have accepted them by failing to give notice of his refusal.⁵⁰

Delivery of less than the contract requires.

In *Rochester, &c., Oil Co. v. Hughey*,⁵¹ the contract was for four barge loads of oil. When the barges were partly filled they were burned, and this was held the seller's loss, and that the oil did not become the property of the buyer as fast as it entered the barge.

§ 536. The general principle is that a chattel ordered to be manufactured continues the property of the manufacturer until completed and delivered or tendered. See *ante* § 408, *et seq.*⁵²

Chattels made to order.

Whether, when a chattel is manufactured to order, the property in it passes upon its completion without acceptance by the buyer, is a question upon which the decisions conflict.

Acceptance of chattel made to order.

In *Bement v. Smith*,⁵³ a machine was built pursuant to a contract and tendered to the customer, who refused to receive it. He was held liable in an action for the price. *Savage, C. J.*, said: "It was not the plaintiff's fault that the delivery was not complete; that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This I apprehend is one of them."⁵⁴

§ 537. In *Ballentine v. Robinson*,⁵⁵ the agreement was to construct

48. See *Southwell v. Beezley*, 5 Oreg. 143; *Bailey v. Smith*, 43 N. H. 141.

49. 42 Mich. 296.

50. *Downs v. Marsh*, 29 Conn. 409; *Defenbaugh v. Weaver*, 87 Ill. 132.

51. 56 Penna. 322. See *Records v. Philadelphia, &c., R. R.*, stated *ante* § 515.

52. See *Pettengill v. Merrill*, 47 Me. 109; *Schneider v. Westerman*, 25 Ill. 514;

Forsyth v. Dickson, 1 Grant (Pa.) 36; *Andrews v. Durant*, 11 N. Y. 35; *Veazie v. Holmes*, 40 Me. 69; *Gregory v. Stryker*, 2 Denio 628.

53. 15 Wend. 493.

54. Cites *Towers v. Osborn*, *Strange* 506, and *Crookshank v. Burrell*, 18 Johns. 58.

55. 46 Penna. 177.

an engine for \$535. The engine was constructed, and the buyer refusing to take it, the seller sued for breach of the contract, and was held to be entitled to recover the contract price, although the engine remained in his shop.

On the authority of these decisions *Shawhan v. Van Nest*⁵⁶ was decided. In that case a carriage was ordered and made, and the customer refusing to accept it, was held liable to pay the contract price.

§ 538. In *Mount Hope Iron Co. v. Buffintou*,⁵⁷ the buyers of an engine received it at a wharf and removed it to their works. The seller had agreed to set up the engine, the buyers furnishing certain materials. All the price had been paid except twenty per cent., reserved until the engine should be started in a satisfactory manner. The engine was attached by a creditor of the seller, and the buyer brought replevin. Wells, J., said that title passed on delivery at the wharf to the buyers. "They might perhaps have rescinded the contract and restored the title, upon a breach by the other party, or a failure to complete and start the engine in a satisfactory manner. But they might also elect to retain possession and title, relying upon their contract, and the margin of twenty per cent. of the price in their hands for their indemnity."

In *Goddard v. Binney*,⁵⁸ a carriage was built on the buyer's order and marked with his name, and he was notified to come and take it. Before he had seen it, and before he had paid anything on it, the seller's shop was burned and the carriage destroyed. The above facts, together with the buyer's request that the carriage should not be sold, was held to throw the risk of loss upon the buyer.

In *Thorndike v. Bath*,⁵⁹ four unfinished pianos were transferred by bill of sale, for their estimated value when finished, and the maker agreed to finish them. He did finish and sell two of them to a *bona fide* purchaser. The title of the first purchaser was sustained.⁶⁰

§ 539. On the other hand, many cases accord with the English rule

56. 25 Ohio St. 490.

57. 103 Mass. 62.

58. 115 Mass. 450, 456.

59. 114 Mass. 116.

60. See, further, that title may pass without acceptance on completion of a chattel, the following cases: *Groff v. Belche*, ante § 404; *West Jersey R. R. v. Trenton Car Works*, ante § 409; *Wilkins*

v. Holmes, 5 Cush. 147; *Veazie v. Holmes*, 40 Me. 69; *Paine v. Young*, 56 Md. 314; *Hadly v. Gano*, Wright (Ohio) 554; *Hyde v. Lathrop*, 2 Abb. App. Dec. 436; *Spicers v. Harvey*, 9 R. I. 582; *Bank of Upper Canada v. Killaly*, 21 U. C. Q. B. 9; *Pratt v. Maynard*, 116 Mass. 388; *Higgins v. Murray*, 4 Hun 565.

that acceptance is necessary to pass the property, that no suit can be maintained for the price before acceptance, and that the seller's remedy is only for damages for refusal to accept. See Book V., Part I., Chap. I.

Thus in *Moody v. Brown*,⁶¹ Shepley, J., said that to effect a change of property in a chattel ordered to be manufactured, there must be tender and acceptance.

So in *Hanauer v. Bartels*,⁶² wheat was to be ground into flour and furnished at a certain price per barrel. The seller delivered the flour to a carrier who, by mistake, left it with the wrong person. The buyer demanded it and brought replevin. The court held that no title passed until acceptance, but the demand was an acceptance, and on that ground the suit was sustained.

In *Rider v. Kelley*,⁶³ the contract was to deliver all the hops which the seller should raise from 2000 hills, at a certain price per pound, according to quality. The hops were raised, tendered, and refused, whereupon suit was brought for damages, and a verdict recovered for the price. The court said that this verdict could only stand on the ground that title passed by the tender; that the case came by analogy within the class of contracts for manufacture of goods. "In such cases the authorities have abundantly established the general rule that the article must not only be made and offered to the vendee, but that he must accept of it, or it must be set apart for him by his consent, before the title to it will vest in him." Referring to the provision as to the quality of the hops the court said: "The vendee was entitled to examine them. They would not become his property against his consent, although if he wrongfully refused to accept them, he would be liable in damages."

§ 540. Where the chattel is not manufactured according to order, the buyer may refuse to receive it, and the property will not pass. See *ante* § 529 and *post* Book IV., Part I., Conditions. This is illustrated by the case of *Woodle v. Whitney*,⁶⁴ where the contract was to manufacture corn cultivators after a certain pattern. The buyer having received them and made a partial payment, found on trial that they were not properly made, and returned them. It was held that he could recover back the money paid, and damages for breach of contract.

61. 34 Me. 107. This was decided on the authority of *Elliott v. Pybus*, stated in the text. See *Gordon v. Norris*, 49 N. H. 376, 15 Am. Law Reg. (N. S.) 160.

62. 2 Col. 514.

63. 32 Vt. 268.

64. 23 Wis. 55.

In England this right to rescind is limited to cases of breach of condition, but many American cases extend it to breach of warranty. See *Boothby v. Scales*,⁶⁵ and cases cited. See, also, *post* Book III., chap. I., § 2.

In *Gowans v. Consolidated Bank of Canada*,⁶⁶ glassware was made to order and paid for, the manufacturer agreeing to store at the buyer's risk and ship as directed. Instead of doing so, he placed the goods in a warehouse and pledged the warehouse receipt for a loan. It was held that title had not passed, and the pledge was therefore valid, no appropriation to and acceptance by the buyer having been proved, and *Story on Sales* § 233, is cited and approved.

65. 27 Wis. 626, 636.

66. 43 U. C. Q. B. 318.

CHAPTER VI.

RESERVATION OF THE JUS DISPONENDI.

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§ 541. It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser, are general rules of *construction* adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules from their very nature cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

§ 542. The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A, in New York, orders goods from B, in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B may execute the order without assuming the risk of A's in-

ability or refusal to pay for the goods on arrival. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods. Or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A. These are the most simple forms in which the question is generally presented, but we shall see that in this class of cases as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*.¹

§ 543. In *Walley v. Montgomery*, (r) the plaintiff had ordered a cargo of timber from Schumann & Co., and they informed him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading and invoice, advising that they had drawn on him at three months, "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley, at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight, &c." Schumann & Co. sent at the same time another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant for the cargo, offering to accept the bills of exchange, but the latter insisted on immediate payment; and on the plaintiff's refusal, sold the cargo, under direction of Schumann & Co. Trover was brought, and Lord Ellenbor-

1. For a concise statement of principal decisions, see § 573, *et seq.* *Walley v. Montgomery.*
plis, see *post* §§ 565-572. For American (r) 3 East 585.

ough at first nonsuited the plaintiff, who did not prove a tender of the freight, but afterwards joined the other judges in setting aside the nonsuit, on the ground that the property passed by the invoice and bill of lading, and that the vendor had lost all rights over the goods, save that of stoppage *in transitu* (as to which, see *post*, Book V., Ch. V.)

In *Coxe v. Harden*, (s) the property was held to have passed under somewhat singular circumstances. Oddy & Co., of London, ordered a purchase of flax, from Browne & Co., of Rotterdam, who executed the order, and sent an invoice to Oddy & Co., and a bill of lading, *unendorsed*, by which the goods were made deliverable to Browne & Co., and a letter, stating, "We have drawn on you at two usances in favor of Lucas, Fisher & Co., &c. We close this account in course." Browne & Co. then sent another bill of lading of the same set to the plaintiff, *endorsed*, for the purpose of securing the amount of their bill upon Oddy & Co. Oddy & Co. transferred their *unendorsed* bill to the defendant, in payment of an antecedent debt, and the defendant got delivery of the flax on that bill, and sold it, notwithstanding plaintiff's warning and demand for the goods under his *endorsed* bill. The action was trover, and the court held, that even assuming the plaintiff to have all the rights of the vendor, he could not succeed, because the property in the goods had passed by the shipment for the buyer's account, and no right remained in the vendor, save that of stoppage *in transitu*. No notice was taken of the vendor's purpose to retain a *jus disponendi*, Lord Ellenborough saying, that the *only thing* which stood between Oddy & Co. and their right to possession, was "the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns." It is to be remarked of this case, that the date at which the bill of lading was endorsed by Browne & Co., to the plaintiff, was not shown; that it was perhaps not so endorsed till after the goods had got into possession of the defendant, and stress was laid on this by one of the judges. At the same time no one of them adverted to the fact, as having any influence on the decision, although printed in italics in the report, that the *endorsed* bill of lading was sent to the plaintiff by Browne & Co., expressly "for the pur-

*Coxe v.
Harden.*

Remarks on
this case.

(s) 4 East 211.

pose of securing the amount of their bill upon Oddy & Co." See *Moakes v. Nicholson*, (t) and *Brandt v. Bowlby*, (u) *infra*.

§ 545. In *Ogle v. Atkinson*, (x) it was again held, that the property had passed, notwithstanding the vendor's attempted reservation of a *jus disponendi*, but the attempt was fraudulent. The plaintiff ordered goods from Smidt & Co., at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of plaintiff, and as being plaintiff's own goods, according to the statement of Smidt & Co., themselves. They afterwards obtained from the captain, by fraudulent misrepresentation, bills of lading in blank, for the goods so shipped, and sent them to their agent, with orders to transfer them to a third person, unless plaintiff would accept certain bills of exchange which Smidt & Co. drew in favor of that third person. Held, that the property had passed, by the delivery to the plaintiff's agent, and was not divested nor affected by the subsequent acts of Smidt & Co.

§ 546. In *Craven v. Ryder*, (y) the vendor maintained his right. The plaintiffs agreed to sell to French & Co. twenty-four hogsheads of sugar, free on board a British ship, two months being the usual credit. They sent it by a lighter, taking a receipt from the ship "for and on account of the plaintiffs," which was proven to be *for the purpose of giving the shipper command of the goods* till exchanged for the bill of lading. French & Co. sold the goods, and the defendant gave a bill of lading for them to the vendee of French & Co. without the plaintiffs' privity. French & Co. stopped payment without paying the price of the sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill of lading already signed for it in favor of the buyer from French & Co. had been assigned to another vendee, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs for the sugar was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The court *held*, that without regard to the form of the receipt, the plaintiffs had the right "to refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and

(t) 34 L. J., C. P. 273; 19 C. B. (N. S.)
290, *post* § 557.

(u) 2 B. & Ad. 932, *post* § 547.

(x) 5 Taunt. 759.

(y) 6 Taunt. 433.

had exercised that right. This seems to be but another mode of describing what, in more recent cases, is termed a reservation of the *jus disponendi*. *Ruck v. Hatfield*, (z) on similar facts, was decided in conformity with *Craven v. Ryder*. (a)

§ 547. In *Brandt v. Bowlby*, (b) the vendor was again successful.

Brandt v.
Bowlby.

The facts were that one Berkeley, of Newcastle, ordered wheat from the plaintiffs, Brandt & Co., of St. Petersburg, through their agent, E. H. Brandt, of London. A dispute arose between Berkeley and E. H. Brandt, and the former countermanded all his orders. In the meantime, however, the plaintiffs had bought a cargo for him, and they put it on board the defendants' ship *Helena*, which Berkeley had chartered and sent for the wheat. They wrote, requesting Berkeley's approval, and enclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*. * * * An *endorsed* bill of lading we have this day forwarded to Messrs. Harris & Co., of London, at the same time drawing upon them for £673 15s., and for the balance remaining in our favor, viz., £136 9s. 5d., we value on you, &c., &c." An *unendorsed* bill of lading was enclosed to Berkeley, together with an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London to the address of R. Harris & Sons there per the *Helena*." The endorsed bill of lading was forwarded by the plaintiffs to E. H. Brandt, their agent. Berkeley refused to accept, and ordered Harris & Co. not to accept. Thereupon E. H. Brandt gave Harris & Co. the *endorsed* bill of lading, and desired them to accept for *his* account, which they did. Berkeley then confirmed his revocation, and was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris & Co., as required by the bill of lading, and when sued in *assumpsit*, sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The court held the contrary, Parke, B., saying: "That depends entirely on the intention of

(z) 5 B. & Ald. 632.

(a) The mate's receipts for goods are valueless after the bills of lading have been signed, and the captain is justified in signing bills of lading without requiring the production of the mate's receipts, if he

is satisfied that the goods are on board. See *Hathesing v. Laing*, 17 Eq. 92, at pp. 102, 103; and *Maud & Pollock on Shipping*, pp. 136, 338, ed. 1881.

(b) 2 B. & Ad. 932.

the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they *intended that the property should not vest in Berkeley unless the bills were accepted.*"

§ 548. In *Wilmshurst v. Bowker*, (c) the plaintiffs bought wheat from defendant on a contract by which they promised to pay for it in a banker's draft, *on receipt of invoice and bill of lading*. The wheat was shipped, and the invoice and bill of lading properly made out and *endorsed to the plaintiffs* were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. Plaintiffs remitted a draft, which was not a banker's draft, and defendant sent it back by return of post, as being contrary to the agreement, and kept back the cargo and disposed of it. The plaintiffs had already failed in an action in trover, (d) and the present action was case for breach of contract. The judgment of the lower court was again for defendant, Tindal, C. J., saying: "There is no doubt that the *property* in the wheat passed to the plaintiffs, * * * but the question is as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties under this contract was, that the consignors should *retain the power of withholding the actual delivery* of the wheat in case the consignee failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the delivery of the bill of lading, * * * and we think the object could have been no other than to afford security to the consignors." But on error to the Exchequer Chamber, this decision was unanimously reversed, (d) the court, composed of Lord Abinger, C. B., Parke, Alderson, and Rolfe, BB., and Patteson, Coleridge and Wightman, JJ., saying that they acceded to the general principle of the judgment of the Common Pleas, but could not agree with it in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property in the plaintiffs. "The delivery of the bill of lading and remitting the banker's draft *could not* be simultaneous acts: the plaintiffs *must* have received the bill of lading and invoice *before* they could send the draft."

(c) 2 M. & G. 792.

(d) 7 M. & G. 882.

(d) 5 Bing. N. C. 541.

§ 549. In *Waite v. Baker*, (e) which is a leading case, decided in 1848, the facts were that the defendant at Bristol bought from one Lethbridge 500 quarters of barley free on board ^{*Waite v. Baker*} at Kingsbridge, and in answer to an inquiry about the shipment wrote to Lethbridge: "I took it for granted that you would get a vessel for the barley I bought from you F. O. B., and therefore did not instruct you to seek one. * * * Please advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

By further correspondence, Lethbridge forwarded copy of the charter-party which he had taken in his own name; advised the commencement of the loading; and on the 1st of January, 1847, wrote: "I hope to be able to send you invoice and bill of lading on Tuesday or Wednesday." And again on the 6th: "I expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying the freight as per charter." Lethbridge took them to Bristol, called on the defendant, and left at his counting-house, early in the morning, an *unendorsed* bill of lading. At an interview with defendant at a later hour on the same day, the defendant made objections to the quality of the cargo, saying that it was inferior to sample, offered to take the cargo and tendered the amount in money, but said that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to endorse the bill of lading, but took it up from the counter and went to the plaintiffs, from whom he obtained an advance on endorsing the bill of lading to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by defendant. There was a verdict for the plaintiff at *Nisi Prius*, and on the motion for new trial, Parke, B., gave the reasons on which the rule was discharged: "It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was

(e) 2 Ex. 1.

agreed to be delivered. By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property it must be shown in this form of action—the action being for the recovery of the property—that at some subsequent time the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on shipboard is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, *but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried.* By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. * * * It is admitted by the learned counsel for the defendant that the property does not pass unless there is a subsequent appropriation of the goods. * * * Appropriation may be used in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. * * * The vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards, amount to an agreement by both parties that the property in

those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that at the time when the unendorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. * * * There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by endorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation, in the sense of that term which alone would pass the property.*" This conclusion of the learned judge is substantially a statement that, though the determination of election by the vendor was complete, and the appropriation therefore perfect in one sense, yet the reservation of the *jus disponendi* prevented it from being complete "in that sense of the term which alone would pass the property." The case is quite in harmony with all the later decisions on the subject.

§ 550. *Van Casteel v. Booker* (*f*) was decided by the same court in the same year. The goods in that case had been placed by the vendor on board of a vessel sent for them by the vendees, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of lading was endorsed in blank by the vendor and sent to the vendees. On the different questions arising in the case, which were numerous, it was held:

First, that the decisions in *Ellershaw v. Magniac* (*g*) and *Waite v. Baker* (*h*) had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act.

Second, that notwithstanding the form of the bill of lading, the contract may be really made by the consignor as agent of the vendee and in his behalf, and it was a question for the jury, in the case before the

(*f*) 2 Ex. 691.

decided.

(*g*) 6 Ex. 570. The case was not reported till some years after it had been

(*h*) 2 Ex. 1.

court, what, under all the circumstances, was the real intention of the consignors or vendors. On the new trial, the jury found that the goods were put on board for, and on account of, and at the risk of, the buyer, and the court refused to set aside the general verdict for the defendants which had been entered on this finding of the jury.

§ 551. In 1850, the case of *Jenkyns v. Brown* (i) was decided in the Queen's Bench. Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of ^{Jenkyns v. Brown.} plaintiffs, and taken a bill of lading for it, deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a New Orleans banker, to whom he also endorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. *Held*, that the property did not pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the endorsed bill of lading to the buyer of the bills of exchange, he had conveyed to them "a special property" in the cargo: and by the invoice and letter of advice to the plaintiffs, he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' right to the goods would not arise till the bills of exchange were paid by them.

§ 552. The case of *Turner v. Trustees of Liverpool Docks* (k) ² was decided in the Exchequer Chamber in 1851, the court being composed of Patteson, Coleridge, Wightman, Erle, ^{Turner v. Trustees of Liverpool Docks.} Williams, and Talfourd, JJ. A cargo of cotton had been purchased in Charleston, on the order of Higginson and Dean, of Liverpool, and put on board their own vessel, which had been sent for it. Bills of exchange for the price were drawn by Menlove & Co., on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading, which had been signed by the master. The bills of lading made the goods deliverable "to order, or to our (Menlove & Co.'s) assigns, he or they paying freight, *nothing, being owner's property.*" The question was, whether by delivery on board the purchaser's own vessel, and by the statement in the bill of

(i) 14 Q. B. 496, and 19 L. J., Q. B. Ch. 332, and other cases cited *post*, Book 286. V., Chap. V., on "Stoppage in Transitu."

(k) 6 Ex. 543. See, also, *Schotsman v. 2. Approved, Farmers', &c., Bank v. Lancaster and York Railway Company*, 2 Logan, 74 N. Y. 568, 576.

lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to the Charleston bankers. The court took time to consider, and the decision was given by Patteson, J., who said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still *reserved to themselves*, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all. * * *

The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owner's property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove & Co., of the 23d of October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts."

§ 553. *Ellershaw v. Magniac* (l) was decided prior to *Van Casteel v. Booker*, (m) and is referred to in that case, but was not reported till 1851. There the plaintiff had contracted with C. & Co., of London and Odessa, for the purchase of 1700 quarters of Odessa linseed, had paid half the price, and had sent the *Woodhouse*, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1700 quarters of linseed, in bulk;" and a quantity of linseed was put on board the vessel at Odessa, the partner there writing to the London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the *Woodhouse*;" and again, "By Friday's post you shall have the bill of lading of the linseed, by the *Woodhouse*." The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and, being in difficulties, got advances by transfer-

*Ellershaw v.
Magniac.*

(l) 6 Ex. 570.

(m) 2 Ex. 691, 702.

ring the bills of lading to the defendant. Held, by the court (Lord Abinger, C. B., and Parke and Alderson, BB.), that the shippers, by making the linseed deliverable to order by the bill of lading, clearly showed *the intention to preserve the right of property and possession in themselves*, until they had made an assignment of the bill of lading to some other person: and the property, therefore, had not passed to the plaintiff.

§ 554. In *Joyce v. Swan*,⁽ⁿ⁾ a decision was rendered in 1864, by the Common Pleas, on the following facts: McCarter, of Londonderry, on the 14th of February, 1863, ordered *Joyce v. Swan.* one hundred tons of guano, from Seagrave & Co., of Liverpool, with whom he had been in the habit of dealing, and was on very intimate terms. On the 26th, he was informed that the Anne and Isabella had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at £10 per ton. * * * Please say if you purpose effecting insurance at your end." On the 2d of March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him, "£1200, on guano, valued at £1200, per Anne and Isabella, from Liverpool to Derry." Then, on the 3d of March, McCarter wrote to Seagrave & Co., in relation to the price of £10: "I really cannot understand this, when I know that Mr. Lawson supplies your guano, in Scotland, at £9 15s. nett, there, to dealers; besides, I look for the special allowance made to me at the origin of our transactions, and now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry, indeed, to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you." The letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave & Co. received this letter on the 4th of March, and fearing from its tenor that McCarter would not accept the cargo, insured it in their own name, on that day, and took a bill of lading, "to order of Seagrave & Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter, by Seagrave & Co., per Anne and Isabella."

§ 555. The invoice and bill of lading were forwarded in a letter to the senior partner of Seagrave & Co., who was then in Ireland, and on the evening of Saturday, the 7th of March, he went on a friendly

(n) 17 C. B. (N. S.) 84.

visit to McCarter's private house near Londonderry, and there told him that he had received these papers from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning they went into town together, and at McCarter's office Seagrave endorsed the bill of lading to McCarter and obtained from him an acceptance for the price, which he at once enclosed to his firm at Liverpool. After this and on the same day, they heard that the *Anne* and *Isabella* had been wrecked on the *evening of Saturday the 7th*. The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that the property had not passed to the purchaser, and that he had therefore no insurable interest.

Erle, J., charged the jury that it was not a necessary condition of the passing of the property that the price should be agreed on; that there might be a contract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave & Co. with the intention of passing the property, they must find for plaintiff, but *if they intended to keep it in their own hands* and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the court. The letter of McCarter was construed by the judges as a "grumbling" assent to the price.

§ 556. It is to be remarked that this case is not at all in conflict with *Turner v. Liverpool Docks*, or *Waite v. Baker*, in holding that although the shipper took the bill of lading to his own order, yet the property had passed when the goods were put on board. The distinction is a plain one. In the former cases the shipper had taken the bill of lading to his own order, for the purpose of *retaining control* of the goods for his own security; but in *Joyce v. Swan*, the shippers and vendors had no purpose nor desire to keep any control of the goods, but, on the contrary, wished the buyer to take them. They were doubtful of the buyer's meaning, and therefore took a precaution against leaving the property uninsured and uncared for if his letter meant that he refused the purchase; but they were acting as his agents and intended to *reserve nothing, no jus disponendi*, if his meaning was that he assented to the price. The buyer interpreted his own language just as the court did; he had meant to take the goods even at the price of £10, and that being so, the vendors

Observations
on this case.

were his agents in taking the bills of lading; and the case is exactly in accord with *Van Casteel v. Booker*, (o) where it was left to the jury to decide as a question of fact, what was the intention of the vendor under all the circumstances of the case; and with *Brown v. Hare*, (p) where it was held that the question of intention must be considered as having been disposed of by the verdict of the jury, because it was one of the facts for their decision on the trial.

§ 557. In *Moakes v. Nicholson*, (q) the facts were, that a sale was made by one Josse to Pope for cash, of a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on ^{*Moakes v. Nicholson.*} board of a vessel chartered by Pope in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th of December, and received by him on the 20th. Josse, being unable to get the price from Pope, sent the stamped bill to his agent, the defendant. In the meantime, on the 13th of December, Pope had sold the coal on the London Exchange, but before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coals before action brought. The defendant induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. *Held, first*, that the plaintiff had no better right than his vendor, Pope, because at the time of his purchase the goods were not ascertained and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title; *secondly*, that no title had passed to Pope from Josse, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the *jus disponendi*; *thirdly*, that the intention of Josse was a fact to be determined by the jury. But *semble*, per Byles and Keating, JJ., that if Pope's sale had been made after his receipt of the bill of lading by endorsing it over, although unstamped, to a *bona fide* purchaser, the result might have been different. The *ratio decidendi* of the case was clearly that Pope's sale was of a thing not yet his, of property not yet acquired, and therefore inoperative to pass the property. *Ante* § 78.

(o) 2 Ex. 691.

(q) 34 L. J., C. P. 273; 19 C. B. (N.

(p) In Ex. Ch., 4 H. & N. 822; 29 L. S.) 290.

J., Ex. 6.

§ 558. In *Fulke v. Fletcher*, (r) the plaintiff, a merchant of Liverpool, acting in behalf of De Mattos of London, had chartered from the defendant a vessel to load a complete cargo of salt for Calcutta. The plaintiff had put on board about 1000 tons of salt, for which he took receipts in his own name, when De Mattos failed, and the plaintiff declined to continue loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1000 tons, on the ground that they belonged to De Mattos. It was proven that the plaintiff was in the habit of buying such cargoes for De Mattos, and charged him no commission, but an advance on the cost of the salt to remunerate himself for his trouble; that the plaintiff always paid for the salt and loaded it at his own expense, and when the cargo was completed sent invoices to De Mattos and received the acceptances of the latter for the cost. Held, under these circumstances, a question of intention for the jury, whether the plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favor of the plaintiff that he had not parted with the goods was maintained.

§ 559. In *Shepherd v. Harrison*, (s) the facts were that Paton, Nash & Co., merchants of Pernambuco, bought for the plaintiff, a merchant of Manchester, certain cotton, and shipped it on the defendant's steamship *Oliuda*, taking a bill of lading. Then they wrote to the plaintiff, saying, "Enclosed please find invoice *and bill of lading* of 200 bales cotton shipped per *Olinda*, costing £851 2s. 7d." The letter also announced that a draft had been drawn for the price in favor of George Paton & Co., the agents in Liverpool of Paton, Nash & Co., "to which we beg your protection." The invoice was headed "Invoice, &c., on account and risk of Messrs. John Shepherd & Co. (the purchaser.)" The bill of lading, however, was *not* enclosed in the letter to the plaintiff, but was, together with the bill of exchange, enclosed to George Paton & Co., of Liverpool, who at once sent a letter to the plaintiff enclosing the bill of lading and the bill of exchange drawn on him, and stating "We beg to enclose bill of lading for 200 bales cotton shipped by Paton, Nash & Co., per *Olinda*, s. s. on your account. We hand also their draft on your good selves for cost of the cotton to which we beg your protection."

(r) 18 C. B. (N. S.) 403; 34 L. J., C. 493; in the House of Lords, L. R., 5 H. P. 146. L. 116.

(s) L. R., 4 Q. B. 196; in Ex. Ch., *Ibid.*

The plaintiff refused to accept the bill of exchange, but retained the bill of lading, and demanded the cotton from the master of the ship, who however delivered the goods to George Paton & Co., on a duplicate bill of lading held by them, and on receiving an indemnity against the plaintiff's claim. The plaintiff's action was trover against the master, but all the courts were unanimous in favor of the defendant, and it was held in the House of Lords: 1st. That the *jus disponendi* had been reserved by the vendors; 2ndly. That where a bill of exchange for the price of goods is enclosed to the buyer for acceptance, together with the bill of lading which is the symbol of the property in the goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange; that if he does so retain it, he thereby acquires no right to the bill of lading or the goods.

§ 560. [In *Gabarron v. Kreeft*, (t) the defendants had bought from one Munoz all the ore of a certain mine in Spain to be shipped by Munoz F. O. B. at Cartagena, on ships to be chartered by the defendants, or by Munoz. The ore was to be paid for by acceptances against bills of lading, or on the execution of a charter-party, in which latter case a certificate that there was enough ore in stock to load the ship was to accompany the drafts. On being so paid for, the ore was to become the property of the defendants. Various vessels had been loaded, and others chartered, and various payments made up to March, 1872, when the *Trowbridge*, one of the ships chartered by the defendants, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the *Trowbridge*, he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, before any ore was put on board the *Trowbridge*, he picked a quarrel with the defendants, telegraphed to them that he would not load the *Trowbridge* on their account, and though they telegraphed back to him threatening him if he did not, he loaded the *Trowbridge*, and took bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. He then endorsed Sabadie's and his own name on the bills of lading, and pledged them for value

(t) L. R., 10 Ex. 274.

with the plaintiffs. No certificate in relation to this ore was given by Munoz to the defendants. The captain was justified in giving the bills of lading, as the charter-party contained a clause authorizing him "to sign bills of lading as presented." It was agreed that at the time of shipment Munoz had no intention to ship the ore for the defendants. The question was whether the plaintiffs, or the defendants, were entitled to the cargo, and this depended for its decision on whether the property became vested in the defendants upon the ore being paid for, as the contract provided it should, or upon shipment on board the vessel chartered by the defendants. The Court of Exchequer held that the plaintiffs were entitled. Bramwell and Cleasby, BB., rested their decisions upon the following grounds: That notwithstanding the provision in the contract to that effect, the payment of the price could not *per se* operate to transfer the property in the ore to the defendants, so long as the ore had not been separated from the bulk of the stock; that there was no evidence of a specific appropriation of the ore in fulfillment of the contract previous to shipment; (1) and that shipment on board a vessel chartered by the defendants did not vest the property in them, when the shipper in dealing with the bills of lading has manifested his intention to reserve the *jus disponendi*. Kelly, C. B., came to the same conclusion upon a quite distinct ground, viz.: that as the defendants by the terms of the charter-party had authorized the master to sign bills of lading as presented, they were estopped from disputing plaintiffs' title as *bona fide* endorsees for value.

§ 561. It will be observed that although the agreement provided that the ore was to become the property of the defendants upon being paid for, yet, since the sale was not one of specific goods, it was necessary that there should be some subsequent appropriation by Munoz for the defendants before the property could actually vest in them. In the absence of any evidence of such appropriation previous to shipment, the question was reduced to this: Did the property pass on actual shipment, the shipper having no right to ship, except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he did take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable? and after a careful review of the authorities cited in the text it was held, that the property did not pass. After commenting on *Ellershaw v. Magniac*, *Turner v. Trustees of the Liver-*

(1) See *ante* § 464

pool Docks, *Fulke v. Fletcher*, *Waite v. Baker*, and *Moakes v. Nicholson*, *Bramwell, B.*, says, at p. 281: "The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him." And *Cleasby, B.*, at p. 285, referring to *Turner v. Trustees of the Liverpool Docks*, and *Shepherd v. Harrison*, as being respectively an early and the latest authority on the subject, says: "The effect of these decisions is that the delivering of goods contracted for, on board a ship when a bill of lading is taken, is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee."

§ 562. In *Ogg v. Shuter* (u), the facts were that the plaintiff made a contract for the purchase of 20 tons of potatoes to be delivered *free on board* at Dunkirk, price to be paid in cash *Ogg v. Shuter.* *against bill of lading*, and the plaintiffs were to pay *part of the price* in earnest of the bargain. The potatoes were shipped under the contract in the *plaintiffs' own sacks* under a bill of lading which made them deliverable to the vendor's order, and the plaintiffs paid £30 in part payment of the price. The vendor endorsed the bill of lading to the defendant, who was his agent in London, and he upon the arrival of the ship presented to the plaintiffs a draft for the balance of the purchase money with the bill of lading annexed. The plaintiffs, believing that the shipment was short, declined to accept the draft for the full amount, and thereupon the defendant *sold* the potatoes to another party. In an action against the defendant for conversion, a verdict was entered by consent for the plaintiffs, leave being reserved to the defendant to move that it should be entered for him, the court to draw inferences of fact. It was held by the Court of Common Pleas that the property in the potatoes had passed to the plaintiffs, on the ground that any evidence of the vendor's intention to reserve the *jus disponendi* manifested by the expression in the contract "*cash against bill of lading*," and by the fact of the vendor taking the bill of lading to his own order, was over-ridden by the other terms of the contract, *viz.*, that the potatoes should be delivered "*free on board*," and that there.

(u) 1 C. P. D. 47, C. A., reversing S. C., L. R., 10 C. P. 159.

should be part payment of the price, coupled with the fact that the potatoes were delivered into the plaintiffs' own sacks.

This decision was reversed on appeal, the Court of Appeal holding—

First, that the retention by the vendor in his agent's hands of the bill of lading in the form in which it was taken was effectual to reserve the *jus disponendi*.

Secondly, that the right so reserved was not merely a vendor's lien on the goods, but involved *the right to dispose of the goods by sale* or otherwise, so long at least as the buyer remained in default.

§ 563. In *Ex parte Banner* (x), the firm of Christiansen & Co., who carried on business at Para, in South America, acted as commission agents in the purchase and consignment of goods for Tappenbeck & Co., at Liverpool. The course of dealing between the parties was as follows: Christiansen & Co., in order to provide funds for the purchase of goods, drew bills of exchange on Tappenbeck & Co., which they discounted at Para. They then purchased the goods with the proceeds, and shipped them for Liverpool, and sent the *bills of lading making the goods deliverable to Tappenbeck & Co.* and the invoices of the goods by post direct to Tappenbeck & Co. At the same time Tappenbeck & Co. were advised of the bills drawn upon them, which, in the ordinary course, they accepted on presentment, and paid at maturity. Both Christiansen & Co. and Tappenbeck & Co. stopped payment. At the time of Tappenbeck & Co.'s stopping payment considerable quantities of goods were in transit between Para and Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills, out of the proceeds of which the goods had been purchased, were accepted, and others refused acceptance by Tappenbeck & Co., but none of them were paid at maturity. *Held* by the Court of Appeal, reversing the decision of Bacon, C. J., that the property in the goods had passed unconditionally to Tappenbeck & Co., and through them to their trustee, and that the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. *Shepherd v. Harrison* was expressly distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the endorsed bill of lading, together with the bill of exchange, to an agent of his own. Mellish, L. J., in delivering the judgment of the court,

said (at page 288): "We think that as soon as the goods were put on board ship at Para and the bills of lading making the goods deliverable to Tappenbeck & Co. *were put into the post directed to Tappenbeck & Co. and were thus placed beyond the control of Christiansen & Co.*, the property in the goods passed to Tappenbeck & Co. We conceive it is perfectly settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods, whilst at sea, from passing to the consignee, he must by the bill of lading make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods *in transitu*, but subject to that right the property in the goods and the right to the possession of the goods is in the consignee."

§ 564. In *Mirabita v. Imperial Ottoman Bank*, (y) the facts, so far as material, were these: The vendors shipped a cargo of umber on board a ship chartered for the plaintiff, and took bills of lading making the cargo deliverable "to order or assigns." They drew a bill of exchange for the price upon the plaintiff, which they discounted with the defendant bank, at the same time handing over to them the bills of lading to be given up to the plaintiff upon his meeting the bill of exchange at maturity. A fresh bill of exchange was afterwards substituted and transferred to the bank in exchange for the original bill. On the arrival of the cargo the plaintiff at first declined to accept the bill, *but he subsequently tendered the amount for which it was drawn*, and demanded the delivery of the bills of lading. The defendants refused to accept the amount of the bill and sold the cargo. The question was, whether under these circumstances the property in the goods had passed to the plaintiff so as to entitle him to maintain an action of trover against the defendants. (z) The Court of Appeal were unanimously of opinion that it had. It was clear that the intention of the vendors was that the property should vest in the plaintiff, subject only to his acceptance and payment of the bill of exchange, and that the defendants were bound to give up the bills of lading to the plaintiff, upon his so doing. Cotton, L. J., (at page 172,) gives so clear an exposition of the principles that run through the decisions that we have

Mirabita v. Imperial Ottoman Bank.

Judgment of Cotton, L. J.

(y) 3 Ex. D. 164, C. A.

with as a legal question, and not upon the

(z) The action was commenced before the judicature acts, and therefore dealt with equitable rights of the parties. See per Cotton, L. J., at p. 171.

ventured to transcribe it in full. "Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite v. Baker*, *Ellershaw v. Magniac* and *Gabarron v. Kreeft*, (in each of which cases the vendors had dealt with the bills of lading for their own benefit,) the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Trustees of Liverpool Docks*, *Shepherd v. Harrison*, and *Ogg v. Shuter*. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is neces-

sary to transfer the property is done; and in my opinion, under such circumstances the property does, on payment or tender of the price, pass to the purchaser."']

§ 565. The following seem to be the principles established by the foregoing authorities:

First.—Where goods are delivered by the vendor in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee. (a)³

Rules deduced
from the
review of the
authorities.

§ 566. *Secondly.*—Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried.⁴ This principle runs through all the cases, and is clearly enunciated by Parke, B., in *Waite v. Baker*, (b) and by Byles, J., in *Moakes v. Nicholson*, (c) [and by Bramwell and Cleasby, BB., in *Gabarron v. Kreeft*, (d) and by Cotton, L. J., in *Mirabita v. Imperial Ottoman Bank*. (e)]

And the above two points were approved as an accurate statement of the law by Lord Chelmsford in *Shepherd v. Harrison*, *supra*.

§ 567. *Thirdly.*—The fact of making the bill of lading deliverable to the order of the vendor, is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. (f)⁵

§ 568. *Fourthly.*—The *prima facie* conclusion that the vendor re-

(a) *Waite v. Baker*, 2 Ex. 1. See, also, *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582; *London and North Western Railway Company v. Bartlett*, 7 H. & N. 400, and 31 L. J., Ex. 92; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Cork Distilleries Company v. Great Southern Railway Company*, L. R., 7 H. L. 269.

3. See *post* § 573-576, for American decisions.

4. See *post* § 577, for American decisions.

(b) 2 Ex. 1.

(c) 19 C. B. (N. S.) 290; 34 L. J., C. P.

278.

(d) L. R., 10 Ex., at pp. 281 and 285.

(e) 3 Ex. D., C. A., at p. 172.

(f) *Wilmshurst v. Bowker*, 2 M. & G. 792; *Ellershaw v. Magniac*, 6 Ex. 570; *Waite v. Baker*, 2 Ex. 1; *Van Casteel v. Booker*, 2 Ex. 691; *Jenkyns v. Brown*, 14 Q. B. 496, and 19 L. J., Q. B. 286; *Shepherd v. Harrison*, L. R., 4 Q. B. 196; in Ex. Ch. Id. 493; L. R., 5 H. L. 116; *Gabarron v. Kreeft*, L. R., 10 Ex. 274; *Ogg v. Shuter*, 1 C. P. D. 47, C. A.; *Ex parte Banner*, 2 Ch. D. 78, C. A.

5. See *post* § 578, for American decisions.

serves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was. (f) ⁶

§ 569. *Fifthly*.—That although as a general rule the delivery of goods by the vendor, on board the purchaser's own ship, is a delivery to the purchaser, and passes the property, yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of freight, because owner's property. (g) [And on a sale of goods which are not specific, although the goods have been delivered on board a ship of, or chartered for, the purchaser, yet, in the absence of any appropriation of the goods in fulfilment of the contract previous to shipment, the fact that the vendor has taken a bill of lading, making the goods deliverable to his own order, or that of a third person, will prevent the property in them from passing to the purchaser.] (h) ⁷

§ 570. *Sixthly*.—That where a bill of exchange for the price of goods is enclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange: and if he refuse acceptance, he acquires no right to the bill of lading or the goods of which it is the symbol. (i) [And the vendor may exercise his *jus disponendi* by selling or otherwise disposing of the goods, so long at least as the buyer remains in default.] (k) ⁸

§ 571. *Seventhly*.—But although the vendor may intend the

(f) *Van Casteel v. Booker*, 2 Ex. 691; *man v. Lancashire and Yorkshire Railway Co.*, 2 Ch. 332; *Gumm v. Tyrie*, 33 Brown v. Hare, 4 H. & N. 822 and 29 L. J., Ex. 6; *Joyce v. Swan*, 17 C. B. (N. S.) L. J., Q. B. 97; in error, 34 L. J., Q. B. 84; *Moakes v. Nicholson*, 19 C. B. (N. S.) 124. 290; 34 L. J., C. P. 273.

6. See post §§ 579 and 580, for American decisions.

(g) *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; *Ellershaw v. Magniac*, 6 Ex. 570; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Van Casteel v. Booker*, 2 Ex. 691; *Moakes v. Nicholson*, 19 C. B. (N. S.) 290; 34 L. J., C. P. 273; *Fulke v. Fletcher*, 18 C. B. (N. S.) 403; 34 L. J., C. P. 146; *Schots-*

(h) *Gabarron v. Kreeft*, L. R., 10 Ex. 274.

7. See post §§ 581 and 582, for American decisions.

(i) *Shepherd v. Harrison*, L. R., 4 Q. B. 196; in Ex. Ch., Id. 493; 5 H. L. 116; *Ogg v. Shuter*, 1 C. P. D. 47, C. A.

(k) *Ogg v. Shuter*, 1 C. P. D. 47, C. A.

8. See post §§ 583-588, for American decisions.

transfer of the property to be conditional upon the buyer's acceptance of the bill of exchange, yet, if he puts into the post addressed to the buyer a bill of lading making the goods deliverable to the buyer's order, he thereby abandons all control over the goods, and the property thereupon vests unconditionally in the buyer, and does not revert in the vendor on the buyer's failure or refusal to accept the bill of exchange.] (l) ⁹

§ 572. [*Eighthly*.—When the vendor deals with the bill of lading only to secure the contract price, as, *e. g.*, by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price.] (m) ¹⁰

AMERICAN DECISIONS. *

§ 573. The decisions in the various States on this subject agree substantially with the principles just stated. A distinction must be made between the case of a consignment in carrying out a contract of sale and a consignment of the goods for some other purpose, as, for instance, to be sold by the consignee. The foregoing principles relate to the former. See *ante* § 565, *et seq.* The effect of a consignment to a creditor has been considered *ante* § 524.

American decisions that the property in goods ordered passes on delivery to a carrier for transportation to the buyer are collected in the last chapter. A striking illustration will be found in the case of *Bailey v. Hudson River R. R. Co.*, ¹¹ which was a suit by the consignee against the carrier. The consignee had made a specific advance upon part of the goods, and the rest were shipped by agreement to pay a debt. Invoices were sent to consignee. After the goods had been delivered to the carrier, one of the consignors changed the direction, and the carrier accordingly delivered the goods to another person. The carrier was held liable for conversion. Church, C. J., said that the intent to pass the property to the consignee appears: "1. By the agreement the day prior to the shipment; 2. By forwarding invoices of the shipment; 3. By making the ship-

Delivery to a carrier.

(l) *Ex parte Banner*, 2 Ch. D. 78, C. A., distinguishing *Shepherd v. Harrison*, L. R., 4 Q. B. 196 and 493; L. R., 5 H. L. 116.

9. See *post*, § 589, for American decisions.

(m) *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, C. A., determining a

point left undecided by Lord Cairns in *Ogg v. Shuter*, 1 C. P. D. at p. 51.

10. See *post* § 590, for American decisions.

*The rest of this chapter is by the American editor.

11. 49 N. Y. 70, 74.

ment unconditionally; 4. By retaining the receipt given by the carrier and neither making nor attempting to make any use of it." 12

On the other hand, it is held in Tennessee that an attaching creditor of the goods in transit can hold them against the consignee, though the latter may have received the bill of lading, and may have paid freight and made advances on the particular goods. 13 But these decisions find little support elsewhere.

§ 574. The seller may expressly reserve title, or the terms of the contract may be such that title will not pass until the goods are received by the buyer. Thus in *Thompson v. Cinn., &c., R. R.*, 14 9000 tons of iron were bargained for in Wales, to be shipped, part to New York and part to New Orleans. Of this, 590 tons were lost at sea. The court said that the contract provided that defendant should make payment for the iron as delivered, implying that the delivery was a condition precedent to the obligation to pay. Furthermore, the buyer was to have an agent at each place of delivery to receive the iron. Therefore the property did not pass until delivery in America, and the risk of transportation was on the seller.

In *Congar v. Galena and Chicago R. R.*, 15 nursery stock was ordered to be delivered, properly packed, at a station in Wisconsin, to be transported to a point in Illinois, the buyer to pay freight and charges, and to give notes for the price on delivery to him in Illinois. This contract was held not to pass title until the property was delivered in Illinois and the notes were given; and the seller was held entitled, as owner, to sue the carrier for damages in transit.

§ 575. In *Suit v. Woodhall*, 16 a liquor dealer in Kentucky employed an agent to solicit orders in Massachusetts, subject to the dealer's approval. An order was filled on terms that the seller should pay the freight from Kentucky to Massachusetts. On a suit for the price the buyer defended on the ground that the sale took place in Massachusetts and was void there under the prohibitory liquor laws.

12. See *Lawrence v. Minturn*, 17 How. 100, 107; *Brown v. McGraw*, 14 Pet. 479; *Schumacher v. Eby*, 24 Penna. 521; *Arbuckle v. Thompson*, 37 Penna. 170; *Philadelphia and Reading R. R. v. Wireman*, 88 Penna. 264; *Nelson v. Chicago, &c., R. R.*, 2 Bradw. 180; *Magruder v. Gage*, 33 Md. 344; *Ober v. Smith*, 78 N. C. 255; *Gwyn v. R. R. Co.*, 85 N. C. 429; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Chaffe v. Heyner*, 31 La. Ann. 594.

13. *Woodruff v. Nashville, &c., R. R.*, 2 Head 87; *Saunders v. Bartlett*, 12 Heisk. 316; *Oliver v. Moore*, 12 Id. 482.

14. 1 Bond 152.

15. 17 Wis. 477.

16. 113 Mass. 391.

The judge charged the jury that the sale took place on delivery to the carrier in Kentucky; but on exceptions this verdict was set aside, the court holding that in view of the evidence that the seller was to pay the freight, it should be left to the jury to determine whether the property passed in Kentucky or Massachusetts.

In *Taylor v. Turner*,¹⁷ under the circumstances of the case, it was held that title did not vest in the consignee. Sheldon, J., said: "Delivery to a carrier is considered as a delivery to the consignee only when, and as, it is in agreement with the terms and intention of the shipment."

§ 576. In *Black v. Webb*,¹⁸ the seller agreed to deliver 1000 bushels of barley within two months at a certain warehouse of a third party, and received \$175 "as an advance to buy barley." After he had placed 652 bushels in the warehouse, and received receipts, the whole was lost by a freshet. He went on and bought 350 bushels more and placed them in the custody of the same warehouseman, and at the appointed time tendered the receipts for the whole thousand to the buyer, who refused them because of the loss of most of the barley represented by them. The seller sued for the price, claiming that he was the agent for the buyer; but the court held that the contract was one of sale and not of agency, and that title had not passed. Spalding, J., said: "It is in evidence that the warehousemen would have felt bound to deliver the barley to any person or persons presenting to them those receipts. These important evidences of ownership B. retained within his own control until after the loss. How can it be said with certainty that this barley would have been transferred to W. in case the warehouse had not been swept away? B. had, in himself, the absolute power of disposal at any and all times as long as he retained the receipts, and W. could not object to a sale of the property in store, so that, at the last, he received in quantity and quality, the barley which B. had agreed to deliver to him."

§ 577. The bill of lading represents the property, and the endorsement and delivery of it constitute the appropriate means of transfer of property while in transit.¹⁹

The bill of lading represents the property.

One who discounts for the shipper a draft on the consignee with bill of lading attached, acquires title to the property. The

17. 87 Ill. 296, 300. See *Cobb v. Ill. Wolf v. Gardner*, 12 Cush. 19; *Hathaway v. Haynes*, 124 Mass. 311; *Tiedeman*

18. 20 Ohio 304.

v. Knox, 53 Md. 612.

19. *Gibson v. Stevens*, 8 How. 384; *De*

delivery of the bill of lading as security for the draft is an appropriation of the property to the holder of the draft, whether the bill is endorsed or not. 20

But, although the bill of lading and the property represented thereby may be transferred by delivery of the bill, yet it is not on the footing of commercial paper. The endorsement or transfer passes only such title as the seller has, and if possession of the bill of lading was procured by fraud, without any title, the holder can pass no title. 21

A distinction was made in *Bissell v. Steel*,²² between the title of one who holds the bill of lading without endorsement as security for a draft discounted on the consignee, and of one to whose order the goods are made deliverable. The former has only a claim on the goods to be paid out of the proceeds; and therefore when such a holder set up a claim to be owner against the sheriff who had levied upon the goods for the consignor's debt, a nonsuit was granted because the claim was not supported by the facts, which the court held showed not ownership but only a lien. But this seems to have been practically overruled by recent cases. 23

§ 578. In the case of *The St. Joze Indiano*,²⁴ goods were captured at sea as the property of an enemy, but were claimed by a friend, one Lizaaur. The consignor (the enemy) consigned the goods "to D. B. & F., (his agents), by order and for account of J. Lizaaur." In a letter to D. B. & F., the consignor wrote, referring to Lizaaur: "We find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." Story, J., said: "In the present case the delivery to the master was not for the use of Mr. Lizaaur, but for the consignees—a house composed of the same persons as the shippers, and acting as their agents. They therefore retained the constructive possession as well as right of property in the

Bill of lading to
vendor re-
serves title.

20. *Holmes v. German Security Bank*, 87 Penna. 525; *Holmes v. Bailey*, 92 Penna. 57; *Jordan v. Wilson*, 25 Penn. 390; *Commercial Bank v. Pfeiffer*, 22 Hun 327; *Hathaway v. Haynes*, 124 Mass. 311; *Shaw v. Merchants' Bank*, 101 U. S. 557; *Hieskell v. Farmers', &c., Bank*, 89 Penna. 155; *Murray v. Warner*, 55 N. H. 546.

21. *Empire Transportation Company*

v. Steele, 70 Penna. 188; *Decan v. Shipper*, 85 Penna. 239; *Baltimore, &c., R. R. v. Wilkens*, 44 Md. 11; *Tison v. Howard*, 57 Ga. 410. See post Book III., Chap. II., sec. II., "Fraud on the Vendor."

22. 67 Penna. 443.

23. *Holmes v. German Security Bank*, 87 Penna. 525, and *Holmes v. Bailey*, 92 Penna. 57.

24. 1 Wheat. 208.

shippers, and it is apparent from the letter that the shippers meant to reserve to themselves and to their agents, in relation to the shipment, all those powers which ownership gives over property."

In *Fifth National Bank of Chicago v. Bayley*,²⁵ a number of barrels of flour were shipped at Chicago, consigned to the shipper's own order, for delivery to a merchant in Boston. The bills of lading were delivered to a bank which discounted drafts on the Boston merchant, and which received as security the bills of lading for delivery on acceptance of the drafts. The Boston merchant refused to accept the drafts, and the property was attached for a debt of the shipper. The bank replevied the flour from the attaching officer, and its title was sustained.

§ 579. But the inference that the seller reserves title from the fact that he procures a bill of lading to his own order is not conclusive.

Property may pass though bill of lading is drawn to vendor.

In *Dows v. National Exchange Bank*,²⁶ Strong, J., said: "We agree that where a bill of lading has been taken, containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him, other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive."

In *Hobart v. Littlefield*,²⁷ a merchant in Providence sent to Galveston an order for 50 bales of cotton. The cotton was bought and delivered on a wharf to the master of a vessel, and the master executed a bill of lading to the order of the consignor, which the consignor endorsed in blank and sent to his agent in Providence, with a draft for collection from the buyer. Part of the cotton was put on board, when a fire took place, and part of the cotton on the dock was destroyed. In a suit for goods sold and delivered, it was held that the goods were at the buyer's risk, and judgment was given for the price. Potter, J., said: "It would not follow, even if the goods were in the plaintiffs' control, that the title and the risk were not in and on the defendants. * * * The title might pass on the completion of the bargain and appropriation of the cotton in such manner that the goods would be at the buyer's risk, and yet the seller retain possession

25. 115 Mass. 228. See *Seymour v. Newton*, 105 Mass. 272; *Redd v. Burrus*, 58 Ga. 574.

26. 91 U. S. 618, 633.

27. 13 R. I. —.

of them by himself, or by the master as his bailee, until paid. If the retention of the bill of lading was merely to retain possession of the cotton for this purpose, then the title and the risk belonged to the defendants."

§ 580. The general principles relative to appropriation of goods to an executory contract are stated by Colt, J., in *Merchants' Bank v. Bangs*.²⁸ In that case corn was ordered and delivered to a railroad company, consigned to the buyer. The seller received from the company a bill of lading acknowledging receipt of the corn consigned to the buyer. On receiving this bill not endorsed, the seller obtained discount of a draft on the buyer for more than the price due. The buyer refused to accept the draft, and, having taken the corn, was sued in trover by the bank holding the draft and the bill of lading. The court said that if title to the corn passed to the buyer on the delivery to the carrier, it could not be divested by the subsequent delivery by the seller of the bill of lading to the bank. Whether it did so pass was a question for the jury. Colt, J., said: "If the bill of lading or other written evidence of delivery to the carrier be taken in the name of the consignee, or be transferred to him by endorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure the payment of the price, although he puts them in course of transportation to the place of destination by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred on payment of the price by his own or his agent's endorsement to the purchaser, and in all cases where he manifests an intention to retain this *jus disponendi*, the property will not pass to the vendee. Practically the difficulty is to ascertain, when the evidence is meagre or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury under proper instructions, and must be submitted to them unless it is plain as matter of law that the evidence will justify a finding but one way."

§ 581. Analogous to the case of delivery on board the buyer's ship is the case of delivery at the buyer's warehouse, or to the buyer as bailee. If the buyer agrees to accept the custody as bailee, until he complies with certain conditions, the title will not pass, and he cannot make sale of the property until the conditions

Delivery to the
buyer as bailee.

²⁸. 102 Mass. 291, 295.

are performed. This results from the application of our author's third rule, stated *ante* § 366, and perhaps should be qualified in some states as far as affects rights of *bona fide* purchasers, as has been shown *ante* § 437, *et seq.* The decisions, however, are not consistent on this subject, even the federal courts regarding more the bill of lading than the actual possession, and sustaining conditions in a bill of lading, which they hold void in a bill of sale or contract for sale on installments, unless recorded as a chattel mortgage.

In *Farmers' and Mechanics' Bank v. Logan*,²⁹ a cargo of wheat was sent to New York to order of consignor, whose agents delivered to the buyer the bill of lading on his acceptance of drafts for the price, under an agreement endorsed on the bill of lading that the delivery was subject to the payment of the drafts, and that the wheat was held in trust to secure the payment. Before the maturity of the drafts, the buyer sold and delivered the wheat to a *bona fide* purchaser, against whom the holder of the drafts brought trover. A recovery of the value of the wheat was sustained.³⁰

§ 582. In *Dows v. National Exchange Bank*,³¹ the owners of wheat in Milwaukee shipped it to fill an order from a merchant in Oswego. They consigned it to the cashier of a bank in Milwaukee, care of a New York bank, and the Milwaukee bank discounted drafts for the price, and endorsed the bill of lading to the New York bank, directing the surrender of the wheat to the Oswego merchant on payment by him of the drafts. At the same time the seller sent an invoice to the buyer. The grain reaching its destination was placed for storage in an elevator of which the buyer was proprietor, to become his property only on payment of time drafts. He wrongfully placed the wheat on board canal boats, shipped it to New York and discounted drafts on pledge of the bills of lading of the canal boats. The Milwaukee bank brought trover against the pledgees. Strong, J., delivered the opinion of the court. "The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat, without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is as appropriate to a bailment as it is to a sale; standing alone it is never regarded as evidence of title.

29. 74 N. Y. 568.

30. This decision was followed in *Farmers', &c., Bank v. Atkinson*, 74 N. Y. 587, and in *Farmers' Bank v. Hazeltine*,

78 N. Y. 104, and both cite and follow the case next stated.

31. 91 U. S. 618.

* * These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation stated in Benjamin on Sales."

§ 583. Our author's sixth principle, stated *ante* § 570, is firmly established by American decisions. As to the seventh, (ante § 571), some doubt may be entertained. No doubt a *bona fide* purchaser from one entrusted with a bill of lading to his own order might rely on it; but as between the parties it is a question of intent.

Bill of lading
tendered on
condition of ac-
cepting draft.

In *First National Bank of Cairo v. Crocker*,³² flour merchants in Illinois being indebted to defendants in Boston, promised to "make it right" at the next shipment. Afterwards the Illinois merchant consigned flour to their own order in Boston, marked, however, for the defendants, and sent the bill of lading with draft on defendants attached, for acceptance on delivery of the bill of lading. The defendants refused to accept the draft but obtained possession of the flour. Thereupon the shipper drew another draft upon other merchants in Boston, and the plaintiffs discounted this draft on security of the bill of lading, but finding that defendants had obtained possession of the flour they brought trover. Their action was sustained. Ames, J., said: "This bill of lading was provisional, and was not intended to vest the property in defendants or to authorize their taking possession of it, except upon the condition of their acceptance of the draft.

* * Upon the refusal of defendants to accept the consignment on the terms offered, the owners of the flour had a right to seek a new consignee."

In *Stollenwerck v. Thacher*,³³ the seller at Mobile shipped cotton consigned to the buyer in Boston, and sent the bill of lading endorsed in blank to the seller's agent in Boston, not to be delivered until drafts attached were paid. The agent delivered the bill of lading without requiring payment, and the buyer thereupon pledged the goods. The seller brought trover for the cotton against the pledgee, and his suit was sustained.

§ 584. The leading New York case on this subject is *Bank of Rochester v. Jones*.³⁴ The owner of a lot of flour at Rochester shipped it to a consignee in Albany, to whom he was indebted, the forwarder

32. 111 Mass. 163.

v. Fisher, 71 N. Y. 353.

33. 115 Mass. 224. See *Marine Bank*

34. 4 N. Y. 497.

giving a receipt for the flour, "to be forwarded to Jones, Albany." On the day of the shipment he discounted at a bank a draft on Jones and delivered the receipt to the bank as security. The bank forwarded the receipt and draft to an agent, but Jones refused, on presentation, to accept the draft, and afterwards stopped the flour at Utica and sold it there. The bank brought trover against him. Paige, J., said that as the receipt was not delivered to Jones, he acquired no right to receive the property. On the other hand, the bank was a pledgee and could maintain trover.

§ 585. In *Cayuga Bank v. Daniels*,³⁵ the consignor agreed to ship all his purchases of apples to the consignees, and received advances in view of that agreement. He shipped a boat-load and took a bill of lading from the captain, showing that he was to deliver the apples to the consignees for account of the consignor. On the same day the consignor insured the cargo, loss payable to the consignees, and delivered the bill of lading and policy to a bank, whose cashier mailed them to the consignees in a letter informing them that they would be drawn on against the property. Two days after, the bank discounted a draft on the consignees, which was presented to them; but they refused to accept it or to return the bill of lading, and afterwards received the cargo. The bank brought trover. The consignees claimed title by virtue of the consignment to them, the prior agreement to ship to them only, and the fact of their advances. But the court held that the consignees had no title. Grover, J., said that the advances of the consignees were not upon the particular apples sent them. "The prior agreement to ship the property confers no title upon the consignee. The owner may violate his agreement and not ship at all; or, if he ships, may consign to another person. In either event no title is ever acquired by virtue of the unexecuted agreement to ship. * * * The owner of the property being free to ship the property or not, and, if he ships, to consign the same to one with whom he has made a prior agreement, or another, it follows that if he consigns to the former he may impose any conditions upon the consignment he chooses, and that such consignee can acquire title to the property only by performing such conditions." *Bank of Rochester v. Jones* is cited and followed.³⁶

35. 47 N. Y. 631.

of *Rochester v. Jones* was also followed in

36. Compare *Bailey v. Hudson R. R. First Nat. Bank of Cincinnati v. Kelly*, Co., 49 N. Y. 70, stated ante § 573. Bank 57 N. Y. 34.

§ 586. In Ohio the law is the same. In *Emery v. Irving Bank*,³⁷ goods were consigned by a dealer in New York to merchants in Cincinnati named in the bill of lading as consignees. The consignor drew against the goods on the consignees and discounted the drafts on pledge of the bill of lading with the bank. The consignees received the goods from the carrier, but refused to accept or pay the drafts because the consignor was indebted to them. The bank sued for the proceeds of the goods, and it was held that they could recover, the property being in them, notwithstanding the bill of lading was drawn to the consignees, who had not endorsed it.

In *First National Bank of Cincinnati v. Kelly*,³⁸ a bank had discounted drafts on the consignee upon the security of a bill of lading, and it was argued that the transaction was a chattel mortgage and therefore void as to a *bona fide* purchaser, for want of filing in the office of a town clerk in Ohio. But the court held that it was not a mortgage but a pledge of the goods, possession of the bill of lading being equivalent to possession of the property.

§ 587. A delivery of goods to a carrier, with directions to collect on delivery, or in the usual phrase marked "C. O. D.," is undoubtedly a reservation of title to secure the payment of the price, and the carrier will be liable if he delivers without receiving the payment. But as we have seen, (*ante* §§ 319 and 335), in the United States, title is sometimes considered to be in the seller for the purpose of protecting him in case of non-payment, and in the buyer for the purpose of holding him liable for payment of the price, and of throwing upon him the risk of loss.

In *Baker v. Bourcicault*,³⁹ cards were ordered to be printed, framed and glazed, and sent by express to the person ordering them. All this was done, but the cards were lost in transit. This was held to be the seller's loss, because he marked the goods C. O. D., thus reserving the *jus disponendi*.

But in *Higgins v. Murray*,⁴⁰ circus tents were made to order, and when finished the buyer requested that they should be forwarded by

37. 25 Ohio St. 360. See *Ontario Bank v. N. J. Steamboat Co.*, 59 N. Y. 510; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Merchants' Bank v. Union, &c., Co.*, 69 N. Y. 373; *Halsey v. Warden*, 25 Kan. 128; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Refining and Storage Co. v. Miller*, 7 Phil. 97; *Lester v. McDowell*, 18 Penna. 91.

38. 57 N. Y. 34.

39. 1 Daly 23.

40. 73 N. Y. 252.

boat or cars. They were shipped and burned in transit. The bill of lading was subject to payment of cash on delivery, being marked C. O. D., the buyer to pay freight. The seller sued for the price. Church, C. J., said: "If the article had burned during the progress of construction, it is clear no action would lie, for the contract was an entirety, and until performed no liability would exist. And this rule would apply when the contract is to make and deliver at a particular place, and loss ensues before delivery at the place. But when the contract is fully performed, both as respects the character of the article and the delivery at the place agreed upon or implied, and defendant is notified, or if a specific time is fixed, and the contract is performed within that time, upon general principles, I am unable to perceive why the party making such contract is not liable." Accordingly the seller had judgment. *Baker v. Bourcicault* seems to have been overruled, though the New York Supreme Court attempted to distinguish it because there no notice had been given to the consignee of the completion of the property.⁴¹

§ 588. When a bill of lading is forwarded to an agent together with a time draft on the consignee, the presumption, in the absence of special instructions, is, that the bill of lading is to be delivered upon acceptance of the draft, and need not be retained until the draft is paid. In *National Bank of Boston v. Merchants' Bank of Memphis*,⁴² the Memphis bank discounted time drafts on the security of bills of lading of cotton shipped to Boston, and forwarded the bills of lading with the drafts to the Boston bank without information or instructions. The Boston bank, not knowing that the Memphis bank had discounted the drafts, delivered the bills of lading upon their acceptance. The Memphis bank sued the Boston bank for negligence, alleging that they should have retained the bills of lading until the drafts were paid. But the Supreme Court held that the fair inference from the transaction was that the drafts were to be paid from the proceeds of sale of the cotton, that therefore the consignee was entitled to possession to enable him to make such sale, and that the holder of the bill of lading took only the shipper's rights, and as the shipper must give up the bill of lading on acceptance of the draft, so must his endorsee. The court cited and followed *Lanfear v. Blossom*,⁴³ and *Wisconsin, &c., Co. v. Bank of*

Whether the reservation is to secure payment or acceptance of a draft.

41. 4 Hun 565. See *Wagner v. Hall*,
lack, 3 Col. 176.

42. 91 U. S. 92.

43. 1 La. Ann. 148.

British North America,⁴⁴ and refers also to *Goodenough v. City Bank*,⁴⁵ and *Clark v. Bank of Montreal*.⁴⁶

See *Farmers', &c., Bank v. Atkinson*,⁴⁷ where *National Bank of Boston v. Merchants' Bank of Memphis* is distinguished, in the former case the consignor and consignee having agreed that payment and not merely acceptance should be secured by the bill of lading.

§ 589. As to our author's seventh principle, (*ante* § 571), it is probably not intended to convey the idea that if one mails a bill of lading to the consignee named therein, title will pass if a contrary intent is manifested. If the bill of lading is delivered in expectation of immediate payment or acceptance of a draft, this is a conditional delivery, and the seller may reclaim the property if such condition is not complied with and he does not waive it, in the same manner as he might reclaim it if the goods themselves were delivered in like manner. See cases stated *ante* § 336, *et seq.* But if the seller entrusts the buyer with a bill of lading to his order, and the buyer is thereby enabled to effect a sale and delivery of goods to a *bona fide* purchaser, it may well be considered that the seller is estopped from setting up his title against such purchaser. See *ante* § 448, *et seq.* But if the bill of lading and the goods are delivered to the buyer as bailee, title will not pass. See *ante* §§ 581, 582.

In *Cayuga Bank v. Daniels*,⁴⁸ the bill of lading made the goods deliverable to the consignee, and was mailed to him with notice of the rights of a pledgee holding drafts on the consignee. The consignee refusing to accept the drafts or surrender the bill, was held liable in trover. See this case stated *ante* § 585.

§ 590. If the bill of lading is to be delivered on acceptance of a draft, the sale is on that condition, and title vests on its performance, and in general not before.

In *Alderman v. Eastern R. R.*,⁴⁹ a car-load of oats was shipped to the consignor's own order, and the bill of lading was sent to a bank with authority to endorse it to the buyer on payment of drafts for the price. The buyer sold the oats, to arrive, to B. & D.

44. 21 U. C. Q. B 284; affirmed, 2 U. Mullen, 15 Penna. 200; *Winter v. Coit*, 7 C. Err. & App. 282. N. Y. 238.

45. 10 U. C. C. P. 51.

46. 13 Grant's Ch. 211.

47. 74 N. Y. 587, 591.

48. 47 N. Y. 631. See *Greener v. Mass.* 503. But see *ante* §§ 568, 579.

49. 115 Mass. 233. To the same effect, see *Newcomb v. Boston and Lowell R. R.*, 115 Mass. 230; *Libby v. Ingalls*, 124

Effect of delivering bill of lading to consignee.

Title vests on acceptance of draft.

On the presentation of the drafts the buyer induced plaintiffs to pay them, and the bank thereupon endorsed the bill of lading to the buyer, who at once endorsed it to plaintiffs. Soon after, the carrier delivered the oats to B. & D., on their representations that they were the purchasers, and plaintiffs, holding the bill of lading, brought trover against the carrier. The suit was sustained. Gray, C. J., said: "The sale and delivery to B. & D. passed no title as against the plaintiffs, because at the time of the sale the seller had acquired none, and at the time of the delivery plaintiffs' title had already vested."

CHAPTER VII.

EFFECT OF A SALE BY THE CIVIL FRENCH AND SCOTCH LAW.

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§ 591. An attempt must now be made to give a summary, necessarily very imperfect, of the principles of the civil law, in regard to the nature of the contract of sale and its effect in passing the property in the thing sold. The subject is the more difficult, because there is a marked distinction between the modern civil law and the Roman law, and because the doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods in their history.

The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and d'Aguesseau, Cujas and Vinnius, Domat and Dumoulin. The Digest, Code and Institutes of Justinian, compiled in the sixth century, during the reign of that emperor (A. D. 527-565), formed prior to the year 1816, the almost exclusive source from which was derived a knowledge of Roman jurisprudence; and in that famous *corpus juris civilis*, the name of Gaius was confounded with those of the other eminent jurists, whose responses (or as we should call them opinions on cases submitted), were adopted by the imperial law-giver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modeled on those of Gaius, who

Discovery of
the Institutes
of Gaius.

lived nearly four centuries earlier, during the reigns of Antoninus Pius and Marcus Aurelius. But the works of Gaius were believed to be irretrievably lost till the year 1816, when Niebuhr discovered in a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers of the fifth century. (a) Savigny recognized the old writing to be the text of Gaius, and after several months of patient labor, the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century of our era. By means of this invaluable addition to former sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure, and it is from their works that the following summary is chiefly extracted.

§ 592. Sale was considered as the offspring of exchange, and for many centuries it was disputed whether there was any difference in the nature of these contracts. "*Origo emendi, vendendique a permutationibus cœpit, olim enim non ita erat nummus; neque aliud merx, aliud pretium vocabatur.*" (b) And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the things were either exchanged by the *permutatio*, or given for a price by the *venumdatio*.

Sale the offspring of exchange.

§ 593. Afterwards, when the idea of binding one party to another by consent, and thus forming an obligation (*juris vinculum*), was entertained, the whole body of possible engagements between man and man was included in the three expressions, *dare, facere, præstare*: *dare*, to give, that is, to transfer ownership: *facere*, to do, or even abstain from doing an act: *præstare*, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of

Dare, facere, præstare.

(a) See a very interesting account of this discovery in the preface to the first edition of Gaius. (b) Dig. 18, 1. De Contrah. Emptione. And see ante p. 1, note (a).

Civil, *prætorian*
and natural ob-
ligations.

obligation were *civil* obligations, which gave a right of action at law: *prætorian* or *honorary* obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the *prætor* (c) and *natural* obligations, for which there was no action at law or in equity, but which might be used in defence, as in *compensatio* or set-off. "*Etiam quod natura debetur, venit in compensationem.*" (d)

The vendee then, like all other contracting parties, had certain actions (e) which alone he was permitted to institute against the vendor. The Institutes of Gaius give us the form of declaration in an action *in personam*. "*In personam actio est, quotiens cum aliquo agimus, qui nobis ex contractu, vel ex delicto obligatus est: id est, cum intendimus, dare, facere, præstare oportere.*"

§ 594. Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange from hand to hand. 1st, the *nexum*, which was effected *per æs et libram*, and consisted in weighing out a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when men had not learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*, all of which had fallen into disuse and derision long before the time of Gaius, (f) who says, "*in odium venerunt.*" 2d, the sale by certain sacramental words alone, and dispensing with the *æs et libram*: this was the *stipulatio* (g) which bound only one side, from its very nature, because it consisted in a promise made in response to the stipulator. A stipulation, therefore, might bind the vendor or the vendee; it required two stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites, were upheld with strictness by the patricians and priests, so that by an exaggerated technicality, the words "*Spondes? Spondeo,*" forming a stipulation, were not allowed to be used by any but Roman

(c) For these two classes giving rights of action, see Inst. 3, 13, 1.

(d) Dig. 16, 2, 6, Ulp.

(e) Com. 4, § 2.

(f) Gai. 4, 30.

(g) The etymology of this word is doubtful: Paulus derives it from *stipulum*, an old word, meaning firm. Sent. 5,

7, § 1. See, also, Inst. 3, 15. Festus, in his Abridgment of *Valerius Flaccus*, says: "*Stipem esse nummum signatum, testimonio est et id, quod datur stipendium militi, et quum spondetur pecunia, quod stipulari dicitur;*" and *Isidor of Seville* (lib. 4, Orig. c. 24,) says: "*Dicta stipulatio a stipula. Veteres enim quando sibi aliquid promitte-*

citizens, (h) foreigners and barbarians being compelled to adopt other words, as "*Promittis*," "*Dabis*," "*Facies*," for the same purpose, these latter expressions being deemed *juris gentium*. But Justinian tells us that this form of contract was obsolete in his day. (i)

§ 595. 3d. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register or account book (*tabulæ, codex accepti et depensi*.) The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should constitute not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month from a diary or blotter (*adversaria*), and was treated as a proof of the highest character, Cicero saying of the *tabulæ*, that they are "*æternæ, sanctiæ quæ perpetuæ existimationis fidem et religionem amplectuntur*." (k) This contract was said also to be an *expensilatio*, from the entries in these books, the party who paid money entering it under this head, as *pecunia expensa lata*, and the one who received it, as *pecunia accepta relata*. 4th. The fourth and last stage was the contract by mutual consent alone; and it is again a remarkable instance of the strict technicality of the Roman law, (l) that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are sale (*emptio-venditio*), letting for hire (*locatio-conductio*), partnership (*societas*), and agency or mandate (*mandatum*.) They are also the only contracts of the Roman law that were termed bilateral, or synallagmatic, or reciprocal: that is, binding the parties mutually (*ultra-citroque*), every other form of contract being unilateral, i. e. binding

Literarum obligatio, or expensilatio.

Mutual consent.

Four contracts juris gentium.

Bilateral or synallagmatic.

bant, stipulam tenentes frangebant, quam iterum jungentes, sponsiones suas agnoscebant." This last etymology seems to be merely an invention, as the French say, *après coup*. Such a mode of contracting, and such a derivation, if true, could scarcely have been unknown to *Paulus* and *Festus*. The word is probably akin to *stipes*, a post, from *stap* to make firm,

an extension of *sta* to stand.

(h) *Gai. Com.* 3, 93.

(i) *Inst.* 3, 15, 1.

(k) *Pro Roscio* 3, § 2.

(l) *Gaius* thus complains: "*Namque ex nimia subtilitate veterum qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem perderet.*"—*L.* 4, § 30.

one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.

[The historical development of the forms of contract is treated in the ninth chapter of Maine's Ancient Law. The class of real contracts, comprising loan (*mutuum*), pledge (*pignus*), and deposit (*depositum*), is there placed in order of time between the literal and the consensual contracts, the links in the chain being: (1) *nexum*, (2) *stipulatio*, and (3) *literal*, (4) *real*, (5) *consensual* contracts.]

§ 596. The sale being at last permitted by mutual consent, its elements were the same as at the common law, with the exceptions now to be considered.

Maine's
Ancient Law.
Distinction be-
tween sale in
Rome and at
common law.

1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos*; or for what it cost you, *quantum tu id emisti*; or for what money I have in my coffer, *quantum pretii in arca habeo*.^(m) The common law rule, that in the absence of express agreement a reasonable price is implied, did not exist in the Roman law.

Price must be
certain.

§ 597. 2dly. It was a received maxim in the Roman law that the vendor did not bind himself to transfer to the buyer the property in the thing sold; his contract was not *rem dare*, but *præstare emptori rem habere licere*. The texts abound in support of this statement. "*Qui vendidit, necesse non habet fundum emptoris facere*," unless he made a special and unusual stipulation to that effect, for the text goes on to say, "*ut cogitur qui fundum stipulanti sponndit*."⁽ⁿ⁾ If the vendor was owner, the property passed by virtue of his promise to guarantee possession and enjoyment, but if not, the sale was still a good one, and its effect was simply to bind the vendor to indemnify the buyer, if the latter was "evicted," that is, dispossessed *judicially* at the suit of the true owner. Ulpian's explanation is entirely lucid. "*Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum*."^(o)

Sale was not a
transfer of
ownership.

Vendor was
bound only to
deliver posses-
sion.

It resulted, therefore, that on the completion of a contract of sale, the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred, was something

^(m) Dig. 18, 1, De Contrah. Empt. 7, §§ 1 and 2.

⁽ⁿ⁾ Dig. 18, 1, 25, § 1, Ulp.

^(o) Dig. 19, 1, 11, § 1, Ulp.

more than the mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; "*vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fidei commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet vacui appellatio.*" (p)

And if the vendor knew that he was not the owner and made a sale to a buyer ignorant of that fact, so as willfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorized to bring an equitable suit, *ex empto*, without waiting for the eviction. "*Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur, utiliter (q) me ex empto acturum putavit [Africanus] in id, quanti mea intersit, meam esse factam. Quamvis enim alioquin verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus fuciat; quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignorantem vendidit.*" (r)

Where vendor knew he was not owner.

§ 598. The eviction against which the vendor was bound to warrant the buyer, was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed.

What was meant by eviction.

In Pothier's edition of the Pandects, he thus states the rule and cites a response of Gaius: "*Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel abductam rem sine successore decesserit, ita ut neque ad fiscum bona pervenire possint, neque privatim a creditoribus distrahi, tunc enim nulla*

(p) Dig. 19, 1, 2, § 1, Paulus.

(q) *Utiliter*, that is, in equity, before the *Prætor*.

(r) Dig. 19, 1, 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law: "If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that even before eviction, an equitable suit *ex empto* might be main-

tained by me for damages (literally, for as much interest as I had, that the thing should become mine.) For, although it would otherwise be true that the vendor is only bound to guarantee possession to the buyer, not also that the thing should become the buyer's, yet because he ought also to warrant the absence of fraud, a man is held responsible who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

competit emptori ex stipulatu actio, quia rem habere ei licet. L. 57, Gaius, lib. 2 *ad Ed. Ædil.-Curul.*" (s)

§ 599. The evicted purchaser had two actions, one *ex empto*, which was the *actio directa*, resulting from the very nature of the contract, and in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it, the true principle in this action being to restore the buyer to the condition in which he would have been, not if he had never bought, but if he had not been dispossessed. (t)

Remedies of
evicted pur-
chaser—
1st—*Actio ex
empto.*

The second action was *de stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given.

This stipulation became so general, that under an *Edictum Ædiliū-Curuliū*, it was considered to be implied in all sales, unless expressly excluded: "*Quia assidua est duplæ stipulatio, idcirco placuit ex empto agi posse si duplam venditor mancipii non caveat.* EA ENIM QUÆ SUNT MORIS ET CONSUETUDINIS, IN BONÆ FIDEI JUDICIIS DEBENT VENIRE." (u) The whole of the second title of the 21st Book of the Digest is devoted to this subject, *De Evictionibus et Duplæ Stipulatione.*

2d—*Actio de
stipulatione
duplæ.*

§ 600. In consequence of the peculiar obligations of the vendor as warrantor against eviction, he was called the *auctor*, who was bound *autoritatem præstare*, to make good his warranty; and the form of procedure was, that whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his vendor, and make him party to the action, so as to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare*; or *auctorem laudare*; *auctorem interpellare*: and the buyer who failed to cite in warranty his vendor, without a legal excuse for his default, lost his remedy. "*Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio,*

Vendor was
bound as *auctor*
to make good
his warranty.

(s) Pothier, *Pandectæ Justinianæ*, lib. 21, tit. 2, *De Evict.* Pars 2, No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise. *Id.*, No. XVI.

(t) The texts are collected in Pothier,

Pand. Just., lib. 19, tit. 1, ch. 1, Nos. 43 to 47, under the head—"Quantum temeretur venditor emptori, evictionis nomine, hæc actione ex empto."

(u) *Dig.*, lib. 21, tit. 2, l. 31, § 20, *Ulp. De Ædil. Edict.*

neque ex stipulatu, neque ex dupla, neque ex empto actionem contra venditorem vel fidejussorem ejus habet." (x)

§ 601. It would seem the natural consequence of these principles, that a vendor who did not even profess to transfer title, must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But, on the contrary, the rule was explicitly laid down in conformity with ours at common law, as exemplified in *Rugg v. Minett*, (y) where the buyer of the turpentine was held bound to suffer the loss of the goods destroyed before delivery, on the ground that the ownership had vested in him. The reasoning by which this result was reached in the Roman law is thus explained by an eminent French jurist. After citing the text of the Institutes, (z) which is in these words: "*Cum autem emptio et venditio contracta sit, quoc effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit;*" the commentator says: "*Quels sont les effets de la vente? C'est de produire des obligations: le vendeur est obligé de livrer et de faire avoir la chose à l'acheteur. Eh bien! si depuis la vente il y a eu des fruits, des accroissements, il sera obligé de même de livrer et de faire avoir ces fruits, ces accroissements. (Dig. 19, 1, de Action. Empt. 13; §§ 10, 13 et 18, Ulp.) Si la chose a diminuée s'est détériorée sans sa faute, il ne sera obligé de la livrer, de la faire avoir, qu'ainsi diminuée, ainsi détériorée; et si la chose a péri sans sa faute, son obligation aura cessé d'exister. Voilà tout ce que signifie cette maxime, que la chose, du moment de la vente, est aux risques de l'acheteur. C'est-à-dire que l'obligation du vendeur de livrer et de faire avoir, s'appliquera à la chose telle qu'elle se trouvera par suite des changements qu'elle aura pu éprouver. Il ne s'agit en tout ceci que de l'obligation du vendeur. Et s'il y a perte totale nous ne ferons qu'appliquer cette règle commune de l'extinction des obligations, que le débiteur d'un corps certain (species) est libéré, lorsque ce corps a péri sans son fait ou sans sa faute. (Dig. 45, 1, de Verb. Oblig. 23, Pomp.) Mais que deviendra l'obligation de l'acheteur relativement au prix? Le prix convenu devra-t-il être augmenté ou diminué, selon que la chose aura reçu des accroissements, ou subi des détériorations? En aucune manière; le prix restera toujours le même. Et si la chose vendue a péri totalement, de sorte que le vendeur se trouve libéré*

Thing sold was at buyer's risk before delivery, although the property had not passed.

(x) Code, tit. de Evic. et Dup. Stip.,
1. 8.

(y) 11 East 210.

(z) Inst. 3, 23, 3.

de l'obligation de la livrer, l'acheteur le sera-t-il aussi de celle de payer le prix? Pas davantage. Les deux obligations, une fois contractées, ont une existence indépendante: la première peut se modifier ou s'éteindre dans son objet, par les variations de la chose vendue—la seconde n'en continue pas moins de subsister, toujours la même. (Dig. 18, 5, de Rescind. Vend. 5, § 2.) Tel était le système Romain—et c'est pour cela qu'il est vrai de dire que du moment de la vente, l'acheteur court les risques de la chose vendue, bien que le vendeur en soit encore propriétaire.” (a)

But although the risk of loss before delivery was thus imposed on the buyer, it was on condition that the vendor should be guilty of no default in taking care of the thing till he transferred it into the buyer's possession, for an accessory obligation of the vendor was *præstare custodiam*. “*Et sane periculum rei ad emptorem pertinet dummodo custodiam venditor ante traditionem præstet.*” (b)

§ 602. Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe wherever based on the civil law, ^{French law.} till the adoption and spread of the Code Napoleon, first among the Latin races, and more recently among the nations of Central and Northern Europe. The French Code says in a few emphatic words, “*La vente de la chose d'autrui est nulle,*” art. 1599, and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the contract in the arts. 1582 and 1583, gave some countenance to the idea that such was not the intention of the authors. Instead of defining a sale to be a transfer of the property or ownership, the language is, in art. 1582: “*La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer;*” and in 1583: “*Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur, à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*” The consequence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the Court of Cassation itself, will be found to furnish authority for the position that a sale transfers only a right of

(a) Ortolan, Explic. Hist. des Inst., (b) Dig. 47, 2 de Furtis, 14, Ulp. tome 3, p. 282.

possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion; (c) and there is a decision of the highest court in France in conformity with it. (d) But this view seems to be now exploded, and all the recent writers, including such great authorities as Duranton, Zachariæ, and Troplong, insist that the modern idea of the transfer of ownership is what was really intended by the authors of the civil code. (e) M. Fréméry gives the following clear exposition of the origin of the difficulty, and adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the *Corpus Juris Civilis*:

§ 603. "The fragments preserved in the Digest conclusively prove that custom had consecrated at Rome a habitual formula for contracts of sale, subject to special clauses, which were to be added to suit the circumstances. According to this formula, it was the vendor who spoke, *legem dicebat*. It was customary according to this formula for the vendor, in expressing the engagements which he agreed to assume, to use these words: *præstare emptori rem habere licere*; terms which, strictly construed, are not as wide in their import as the words *rem dare*. The jurists decided on this state of facts that every ambiguous clause was to be interpreted against the vendor, whose fault it was, not to have expressed himself more clearly. They further decided that he was not bound to transfer ownership.

"Justinian inserted these decisions in his Digest, and made them the law; so that, deriving their authority from legislation, and not from the special circumstances of fact, on which the juriconsults had reasoned, they became applicable to every contract of sale by its nature, as recognized by the law. If, then, the old formula is abandoned, and the vendor uses the words *rem dare*, and no longer *rem habere licere*, how can one explain a law which declares that the vendor does not bind himself to transfer the ownership? And if, using neither locution, he simply says, 'I sell,' and leaves it to usage to determine the meaning which it has attached to these words, what is to be done if it be manifest that all who use these words attach to them the idea that the vendor binds himself to transfer the ownership?

(c) Tome 14, No. 240, *et seq.*

(d) Sirey 32, 1, 623.

(e) Favart, V^o Vente; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4

et seq.; tit. 2, add *au même* No.; Duvergier tit. 1, Nos. 10, *et seq.*; Championnière *et*

Rigaud, Dr. d'Enreg., t. 3, No. 1745; Zachariæ, t. 2, § 349.

"This is precisely what has happened. For many centuries it has been taught in our schools that it is of the nature of the contract of sale that the vendor is not bound to make the purchaser the owner of the thing sold: *ipse dixit!* And yet for many centuries also, the words 'I sell,' are no longer paraphrased by the Roman formula which determined their meaning; the man who utters them or hears them, understands unhesitatingly that he who sells is to make the purchaser owner of the thing sold; and every one is asking how it is that by the nature of the contract of sale, the vendor is not bound to transfer the ownership to the purchaser?"

"Since the Civil Code has appeared, however, and has declared in the art. 1599, 'The sale of another's thing is null,' many persons have inferred that this must be because the two parties have the intention, one of transferring, the other of acquiring, the property in the thing sold: so that the nature of the contract of sale, which, according to the Roman law, did not impose on the vendor the obligation of transferring the ownership to the purchaser, does, on the contrary, according to the French law, comprehend this obligation." (f)

§ 604. In Scotland the property in goods never passes until delivery, and the law was stated by Lord President Inglis in December, 1867, in the case of *Black v. Bakers of Glasgow*, (g) as follows: "There could be no stoppage *in transitu* in this case, simply because the goods never were in a state of *transitus*. No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitus* to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer. Unless the seller has parted with the possession his remedy is not stoppage *in transitu*, but in Scotland *retention*, and in England an exercise of the seller's right of lien. I should think it almost unnecessary, at this time of day, to point out the important distinctions which exist between the laws of Scotland and England, as regards the seller's rights in goods sold and not delivered. The seller of goods in Scotland (notwithstanding the personal contract of sale) *remains the undivested owner of the goods, whether the price be paid or not, provided the goods be not delivered; and the property of the goods cannot pass without delivery, actual or constructive*; the necessary consequence is, that the seller can never be asked to part with the goods until the price be paid. Nay, he is enti-

(f) Fréméry, *Etudes du Droit Commercial*, p. 5.

(g) 40 Jurist 77; 6 Court Sess. Cas. (3d ser.), at p. 140.

tled to *retain them against the buyer and his assignees, till every debt due and payable to him by the buyer is paid or satisfied*. The seller's right of retention thus being grounded on an undivested right of property, cannot possibly be of the nature of a lien, for one can have a lien only over the property of another. In England, on the other hand, the property of the goods passes to the buyer by the personal contract of sale, and the seller's rights thereafter, in relation to the undelivered subject of sale (whatever else they may be), cannot be the rights of an undivested owner. English jurists are not agreed as to the true foundation in principle of the seller's lien. I shall only say, that if it be not an equitable remedy like stoppage *in transitu*, it is certainly not the assertion of a legal right of ownership like the right of *retention* in Scotland." (h)

In *Couston v. Chapman* (i) will be found an exposition of the difference between the law of England and that of Scotland in a sale by sample.

(h) The difference between the English Cas. at p. 608.
and the Scotch law is also stated by Lord (i) L. R., 2 Sc. App. 250.
Blackburn in *M Bain v. Wallace*, 6 App.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

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§ 605. It has already been shown that a party who has given an apparent assent to a contract of sale, may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject matter of the sale, the price, and in some instances, the identity of the other contracting party. (a) The contract in such case has never come into existence for want of a valid assent. We enter now on the consideration of cases where the contract has been carried into effect under a continuance of mistake, and when the party who contracted through

(a) *Ante* § 50, *et seq.*

error is no longer passive, declining to execute, but active, seeking to set it aside.

[By sec. 34, subs. 3, of the judicature act, 1873, the rectification, setting aside, and cancellation of deeds or other written instruments, are assigned to the Chancery Division of the Judicature act, 1873.

High Court. But when such relief is claimed *by way of defence* to an action brought in one of the Common Law Divisions, the courts of those divisions have jurisdiction to give effect to the equity at least for the purpose, and to the extent of determining the action, (b) and the mere fact that a counter-claim in an action seeks for rectification of a deed and specific performance of an agreement is not a sufficient ground for having the action transferred to the Chancery Division. (c) It has not been determined whether the Common Law Divisions have power on such a counter-claim to grant substantive relief.]

§ 606. The mistake alleged as a reason for avoiding a contract may be that of both parties, or of one alone; it may be a mistake of law or of fact; and when the mistake is that of one party alone, that fact may be known or unknown to the other contracting party.

When there has been a common mistake as to some essential fact, forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable.¹ If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of

Common mistake.

Contract cannot be rescinded where *restitutio in integrum* impossible.

(b) *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

(c) *Storey v. Waddle*, 4 Q. B. D. 289, C. A. But see *Holloway v. York*, 2 Ex. D. 333, C. A.

1. **Mistake as to Price, or Quantity.**—See *ante* § 50, note 16. *Armstrong Furniture Co. v. Kosure*, 66 Ind. 545. In *Rupley v. Daggett*, 74 Ill. 351, the seller offered a horse for \$165. The buyer said: "Did I understand you sixty-five?" The seller answered yes, supposing that the buyer referred to the amount in addition to \$100. The buyer took away the horse, but the seller learning that the buyer understood that the price was \$65 only,

replevied the horse, and the suit was sustained.

Mistake as to Quality.—In *Byers v. Chapin*, 28 Ohio St. 300, a cooper sold and delivered a lot of barrels for oil and received the price. The cooper prepared them for use according to custom by glueing, but pronounced them improperly made, and returned them, the buyer assenting and giving back a note for the greater part of the price. Subsequently the cooper discovering, as he alleged, that the barrels would have answered the purpose if they had been properly glued, tendered a return of them, and demanded back the note, and on a refusal,

the other side, a restoration to the condition in which he was before the contract was made. If that be not possible, the deceived party must be content with a compensation in damages. And this rule is applicable to cases even where the mistake of the complaining party was caused by the fraud of the other. (d) 2

Even where
mistake was
caused by
fraud.

and suit upon the note he set up these facts as a defence. The jury found for defendant, and the court sustained the verdict, there being evidence that the note had been given under the belief that the barrels were not properly made for oil barrels, and that this belief was mistaken, the barrels being in fact suitable if properly glued by the buyer.

Mistake as to Identity or Subject Matter.—In *Kyle v. Kavanagh*, 103 Mass. 356, the contract was to sell a lot on Prospect street in Waltham. There were two streets of that name, and each party mistaking the intent of the other as to which was meant, it was held that there was no contract. See *Barfield v. Price*, 40 Cal. 535, 542. In *Harvey v. Harris*, 112 Mass. 32, the sale was of two rows of barrels of flour as damaged flour. In fact the flour was sound, having been placed by mistake in a lot of damaged flour. It was held that this was not merely a mistake in quality of the thing sold, but a mistake in identity. See *Cutts v. Guild*, 57 N. Y. 229; *Sheldon v. Capron*, 3 R. I. 171. In *Hillis v. Snell*, 104 Mass. 173, a warehouseman having flour on storage for two persons, delivered to a purchaser from one, out of the more valuable lot of the other. The purchaser having paid for it and innocently used it, was held not liable either in tort or contract, to the warehouseman. Where the sale is of an animal, supposed by both parties to be alive, but in fact dead, or of a ship, which has been destroyed without the knowledge of either, or where both are under a mistake of fact as to any essential element of the agreement, it is void. See *ante* § 76, note 1; *McGoren v. Avery*, 37

Mich. 120. In *Chapman v. Cole*, 12 Gray 141, the owner of a gold coin worth \$10, not lawful money, passed it off by mistake for a half-dollar piece. It was held that he could recover in trover against one who held it in good faith for value. Had it been lawful money the case would have been otherwise, as that cannot be followed even though stolen. In *Montgomery County v. American Emigrant Co.*, 47 Iowa 91, the county sold all its swamp land. A new allotment of swamp land had been made, of which the county officers were ignorant. *Held*, that the contract being made under a material mistake of fact, must be set aside.

(d) *Hunt v. Silk*, 5 East 449; *Blackburn v. Smith*, 2 Ex. 783; *Sully v. Fearn*, 10 Ex. 535; *Clarke v. Dickson*, E. B. & E. 148; 27 L. J., Q. B. 223; *Savage v. Canning*, 16 W. R. 183; 1 Ir. C. L. 434. And see next chapter.

2. Restoration Must be Complete.—

If the party desiring to rescind has changed the condition of the property while ignorant of the fraud, he can no longer have the remedy of rescission. *Smith v. Brittenham*, 98 Ill. 188. "No principle is better settled than that a party cannot rescind a contract, and at the same time retain possession of the consideration in whole or in part, which he has received under it." *Leonard, J.*, in *Bishop v. Stewart*, 13 Nev. 25, 41, citing many cases; *Masson v. Bovett*, 1 Denio 69; *Hendrickson v. Hendrickson*, 51 Iowa 68; *Gay v. Alter*, 102 U. S. 79; *Grymes v. Sanders*, 93 U. S. 55, 62; *Lyon v. Bertram*, 20 How. 149, 154; *Haase v. Nonnemacher*, 21 Minn. 486; *Hammond v. Buckmaster*, 22 Vt. 375;

§ 607. In *Strickland v. Turner*, (d) the sale was of an annuity, dependent on a life that had ceased without the knowledge of either party, and the purchaser paid his money. *Strickland v. Turner.* Held, that he could recover it back as money had and received.

In *Cox v. Prentice*, (e) the plaintiff bought a bar of silver, and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver was much less than was stated in the report. Held to be a common mistake, and that the plaintiff, on offer to return the bar, could recover the price paid in *assumpsit*, Lord Ellenborough saying, it was just as if an article is sold by weight, and there is an accidental misreckoning of the weight. *Cox v. Prentice.*

§ 608. The case of *Boulton v. Jones*, (f) was a very singular case of

Vance v. Schroyer, 79 Ind. 380; *Coolidge v. Bingham*, 1 Metc. 547; *Thayer v. Turner*, 8 Metc. 550; *Cook v. Gilman*, 34 N. H. 556, 560; *Tisdale v. Buckmore*, 33 Me. 461; *Auger v. Thompson*, 3 Ont. App. 19. In *Morse v. Brackett*, 98 Mass. 209, the buyer returned wool bought by him because not of the character warranted. But as he did not return the bag containing the wool, it was held that he had not put the seller in the same position as before the contract. See *Bassett v. Bram*, 105 Mass. 551, 558, where the value of the property not returned was trifling. But the tender need not be made where the thing received is utterly valueless, such as forged securities. *Brewster v. Burnett*, 125 Mass. 68; *Smith v. Smith*, 30 Vt. 139; *Royce v. Watrous*, 7 Daly 87, affirmed 73 N. Y. 597; *Dill v. O'Ferrell*, 45 Ind. 268; *Hess v. Young*, 59 Ind. 379. Nor where the suit is against a third person who has possession with notice, of the property sought to be reclaimed. *Stevens v. Austin*, 1 Met. 557. The rescission must be within a reasonable time. *Wolf v. Dietzsch*, 75 Ill. 205; *Johnson v. McLane*, 7 Blackf. 501. What is a reasonable time depends on the circumstances of each case. *Marston v. Simpson*, 54 Cal. 189; *Grymes v. San-*

ders, 93 U. S. 55, 62. When the seller applied to a court of equity to enjoin a suit at law on an agreement of sale which by mistake transferred more property than was intended, and it appeared that he had not in good faith carried out the agreement as in fact made, the court refused to enjoin the suit at law except on condition of a rescission of the original contract, and putting the other parties *in statu quo*. *Cassidy v. Metcalf*, 66 Mo. 519. In *Herman v. Haffenegger*, 54 Cal. 161, in a suit to rescind, the plaintiff's offer to return the property received by him was not made until the trial, and this was held too late. The tender should be before suit. *Gould v. Cayuga Co. Bank*, 21 Hun 293, 304; *Gifford v. Carvill*, 29 Cal. 589.

(d) 7 Ex. 208. See a similar case in equity, *Cochrane v. Willis*, 1 Ch. 58.

(e) 3 M. & S. 344.

(f) 2 H. & N. 564; 27 L. J., Ex. 117, followed in the American case of *The Boston Ice Co. v. Potter*, 123 Mass. 28, ante § 59. See a criticism on the remarks in the text in *Pollock on Contracts*, Appendix E, p. 457 (2d ed.) The note is omitted in the 3d edition. See, however, note at p. 436 of that edition.

*Boulton v.
Jones.*

mutual mistake, and is well worth consideration. The facts have already been stated at length (*ante* § 58), and were substantially these: One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop and business to the plaintiff Boulton. On the same day, Jones, ignorant of this sale, sent a written order for goods to the shop, addressed to Brocklehurst, and Boulton supplied them. Jones consumed the goods, still ignorant that they were supplied by Boulton, and when payment was asked for, declined, on the ground that he had a set-off against Brocklehurst, with whom *alone* he had assented to deal. The action was for goods sold, and the court held that there was no contract by Jones with the plaintiff, and that inasmuch as he had a set-off against Brocklehurst, the mistake as to the person was sufficient to entitle him to refuse payment. So far the case was in accordance with the rule laid down by Gibbs, C. J., in *Mitchell v. Lepage* (*g*) (not cited in *Boulton v. Jones*), and the plaintiff could not be permitted to

*Observations
on Boulton v.
Jones.*

recover. But on the principles governing contracts in general, it is submitted that the plaintiff was not wholly without remedy. For aught that appears in the report, there was a clear case of mutual mistake. The plaintiff, who had just bought out the shop and business of Brocklehurst, did nothing wrong, nothing out of the usual course of trade in supplying goods on a written order sent by a customer to a shop, addressed to the man whose business he had just bought, and in ignorance of the fact that it could be at all material to the buyer whether the goods were supplied by himself or by his predecessor in business. Plaintiff's mistake was his ignorance that the defendant wished to buy *qua* creditor of Brocklehurst, so as to pay for the goods by a set-off. Defendant's mistake was in consuming the goods of the plaintiff, in the belief that they were the goods of Brocklehurst. It can hardly be doubted that if the goods had not been consumed before the discovery of the mistake, the defendant would have been bound on demand to return the goods if he did not choose to pay for them. The very basis of the decision was that there had been *no contract* between the parties, and if so, on no conceivable ground could the defendant have kept without payment another man's goods sent to his house by mistake. The consumption of the goods prevented the possibility of a simple avoidance of the contract on the ground of mutual mistake. That mistake was in

(*g*) Holt N. P. 253.

relation to the *mode of payment*. The vendor thought he was to be paid in money: the buyer intended to pay in his claim against Brocklehurst. The real question under the circumstances then was this: Is the buyer to pay as *he* intended, or as the *vendor* intended? for both had intended that the property in the goods should pass, at the price fixed in the invoice. Now, in determining this, which was the real dispute, a controlling circumstance is that the buyer was wholly blameless, whereas the seller had been guilty of some slight negligence. If the seller had sent an invoice or bill of parcels with the goods, showing that *he* was the vendor, the buyer would have been at once informed of the mistake, and might have rejected the goods; but the vendor delayed sending his invoice till the goods were consumed. The true result therefore of the whole transaction, it is submitted, is in principle this, that the buyer was bound to pay for the goods in the manner in which he had assented to pay, and the vendor was bound to accept payment in that mode. The buyer was therefore responsible, not at law (for courts of law have no means nor machinery for reforming contracts nor rendering conditional judgments), but in equity, either to make an equitable assignment to the vendor of his claim against Brocklehurst for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against Brocklehurst. He would have no right to retain the whole of his claim against Brocklehurst while refusing to pay for the goods. (A) The case is manifestly quite distinct from that of a mutual mistake, where a party has consumed what he did not intend to buy. If A sends a case of wine to B, intending to sell it, but fails to communicate his intention, and B, honestly believing it to be a gift, consumes it, there is no ground for holding B to be responsible for the price, either in law or equity, if he be blameless for the mistake. ⁸

(A) See for illustration of equitable principles in such cases, *Harris v. Pepperell*, 5 Eq. 1.

3. Mistake as to the Person of the other party.—In *Gregory v. Wendell*, 40 Mich. 432, 443, Cooley, J., said: "No man can be compelled against his will to accept another contracting party in place of the one he has dealt with, even though a contract with such other party may be equally valuable." *Boston Ice Co. v. Potter*, 123 Mass. 28, stated *ante* § 59, is a

striking illustration of the effect of a mistake by the buyer in the person with whom he was dealing. The article sold having been consumed, it was held that the seller, who had undertaken to supply the contract of another, could not recover in any form of action. On the other hand, where the buyer discovered the mistake before he had consumed the article, and instead of at once returning it, kept and used it, he was held liable. *Mudge v. Oliver*, 1 Allen 74. See *Ran-*

§ 609. Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A and B contract for the sale of the cargo per ship "Peerless," and there be two ships of that name, and A mean one ship and B intend the other ship, there is no contract. (i) But if there be but one ship "Peerless," and A sell the cargo of that ship to B, the latter would not be permitted to excuse himself on the ground that he had in his mind the ship "Peecress," and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A's proposal were unmistakable, as if it were made in writing, and B's answer was an unequivocal and unconditional acceptance, B would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel.

Mistake of one party not communicated to the other.

For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention. (k) 4

General rule of law where a party does not manifest his real intention.

dolphn Iron Co. v. Elliott, 34 N. J. L. 184; *Orcutt v. Nelson*, 1 Gray 536, 542; *Winchester v. Howard*, 97 Mass. 303, stated *post* note 5. If one falsely represents himself as agent for another, and as such procures goods, there is no contract at all. *Decan v. Shipper*, 35 Penna. 239; *Barker v. Dinsmore*, 72 Penna. 427; *Dean v. Yates*, 22 Ohio St. 388; *Moody v. Blake*, 117 Mass. 23. In *Hamet v. Letcher*, 37 Ohio St. 356, Hamet sold and delivered a lot of hogs to one Rohner as agent for Letcher. In fact, Rohner was not agent for Letcher, his representations to that effect being false. Rohner sold the hogs to Letcher and received payment. Hamet, not receiving payment, brought suit against Letcher for conversion. It was held that he was entitled to recover. Okey, C. J., said: "The circumstance that Hamet intended that Letcher & Co. should have the hogs is of no importance. He never intended that they should acquire title from any other than

himself, nor do they make any claim to such property under any purchase they made from him."

(i) *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

(k) Per Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases collected in notes to it, 2 Sm. L. C. 775, (8th ed.); *Cornish v. Abington*, 4 H. & N. 549; 28 L. J., Ex. 262; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J., Ex. 198; *Van Toll v. South Eastern Railway Co.*, 12 C. B. (N. S.) 75; 31 L. J., C. P. 241; *In re Bahia and San Francisco Railway Co.*, L. R., 3 Q. B. 584; *Carr v. London and North Western Railway Co.*, L. R., 10 C. P. 307, per Brett, J., at p. 316.

4. Mistake of One not Known to the Other.—In *Stoddard v. Ham*, 129 Mass. 383, mentioned *ante* § 53, note 20, a quantity of brick were sold and delivered, the seller supposing that the buyer was acting in the purchase as agent for a particular person. Finding that the buyer was not

§ 610. When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud, which is the subject of the next chapter.⁵ In the case just supposed of a ship "Peerless" and a ship "Peeress," Mistake of one party known to the other. there can be little doubt that if the vendor *knew* that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of law just stated, the vendor would not be in a position to show that he had been *induced* to act by a manifestation of the buyer's intention different from his real intention. And if he not only knew the buyer's mistake, but caused it, his conduct would be fraudulent. But, as a general rule in sales, the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful neither party could avoid the contract made under the supposed error or mistake.

acting as such agent, the seller brought trover, but it was held that he could not recover, the buyer not being aware of the mistake. Colt, J., said: "The difficulty is, that the plaintiffs, if they had any other intention, (than that of sale to the buyer), neglected to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that he was acting as agent for a third person." See cases cited *ante* § 53, note 20. Stoddard v. Ham is distinguished in Hamet v. Letcher, stated note 3, *ante*.

5. Mistake of One, Known to the Other.—Winchester v. Howard, 97 Mass. 304, was a case where the buyer erroneously supposed the seller to be the owner of the property sold, and the seller knew of this mistake, and concealed the fact that he was agent. The principal was

one with whom the buyer would not willingly have any dealings. It was held that the buyer might rescind. In Holtz v. Schmidt, 59 N. Y. 253, an agreement was made that if the plaintiff, a liquor dealer, should buy goods required in his business from defendant, an importer, that defendant would sell to him at as low a price as to any one else. Defendant sold to others at a lower price than to plaintiff, who sued for the difference. Andrews, J., said that the contract imposed no obligation except so far as acted on, then it became operative; and he sustained the action, saying: "The law will imply a promise on the part of the defendant to restore the money thus inequitably obtained, and which was paid by the plaintiff under a mistake of fact, and received by the defendants, knowing that they were not entitled to it."

The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other. This topic is more fully considered in the next chapter on Fraud.

§ 611. The mistake which will justify a party in seeking to avoid his contract must be one of fact, not of law. The universal rule is *Ignorantia juris neminem excusat*.⁶ The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note. (*l*) But in *Wake v. Harrop*, (*l*) it was held, both in the Exchequer of Pleas and in the Exchequer Chamber, that where a party had specially stipulated that he was acting only as agent for another, and had signed as such agent for his absent principal named in the signature, he was at liberty to show, by way of equitable defence, that the agreement which had been drawn up in such terms as to make him personally liable at law, was so written by mistake, that it did not express the real contract, and that he was not liable as principal. Some of the judges thought the plea a good defence, even at law, but this point not being raised, was not decided.

§ 612. In *Cooper v. Phibbs*, (*m*) Lord Westbury gave the following very lucid statement of the true meaning of the maxim just quoted. "It is said *ignorantia juris haud excusat*, but in the maxim this word *jus* is used in the sense of denoting general

6 Mistake as to Legal Effect of Agreements.—Where the mistake is as to the legal effect of an agreement, the party misunderstanding it cannot be relieved from its performance on that ground. *Clark v. Lillie*, 39 Vt. 405; *Miller v. Lord*, 11 Pick. 11; *Smither v. Calvert*, 44 Ind. 242; *Clodfelter v. Hulett*, 72 Ind. 137, 143. Where, however, both parties have acted on an admissible construction of an ambiguous contract, the court will adopt that construction. *Coleman v. Grubb*, 23 Penna. 393. But where the meaning is plain, the error of the parties cannot control its effect. *Railroad, Co. v. Trimble*, 10 Wall 367, 377. In *Rice v. Dwight Manufacturing Company*, 2 Cush. 80, 86, *Forbes, J.*, said: "When a contract is reduced to writing it

may, and probably does sometimes happen that one or both of the contracting parties misapprehend the legal effect, yet if it be not unintelligible, the court will read the contract for the parties, and they will be bound by its legal effect." See *post* note 8.

(*l*) *Bilbie v. Lumley*, 2 East 471; *Stevens v. Lynch*, 12 East 38; *East India Co. v. Tritton*, 3 B. & C. 280; *Milnes v. Duncan*, 6 B. & C. 671; *Stewart v. Stewart*, 6 Cl. & F. 966; *Teed v. Johnson*, 11 Ex. 840; *Platt v. Bromage*, 24 L. J., Ex. 63; *Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J., Ex. 273; 31 L. J., Ex. 451.

(*m*) L. R., 2 H. L. 148-170; and see *Jones v. Clifford*, 3 Ch. D. 779.

law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may also be the result of matter of law: but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it: the mistake is discovered and the agreement cannot stand.” The case was that of a party the real owner of a property, agreeing in ignorance of his right, to take a lease of it from the supposed owners, who were equally ignorant that they had no title to it.

§ 613. [And in *Earl Beauchamp v. Winn*, (n) Lord Chelmsford said: “With regard to the objection, that the mistake (if any) was one of law, and that the rule, *Ignorantia juris neminem excusat* applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake.”

In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as by the courts of common law, and there are cases in which equity grants relief against mistakes of law, the ground for the relief being that, under the particular facts of the case, it is inequitable that the one party should profit by the mistake of the other. (o)

And now it would seem that under the judicature act, 1873, sec. 25, subs. 11, the rule adopted by courts of equity will prevail.]

§ 614. An innocent misrepresentation of fact or law may give rise to a contract, and thus involve the question, whether the party deceived by such innocent misrepresentation is entitled on that ground to avoid the contract.

(n) L. R., 6 H. L., at p. 234.

per Mellish, L. J., in *Rogers v. Ingham*,

(o) Per Turner, L. J., in *Stone v. Godfrey*, 5 D., E. M. & G. at p. 90; per James, L. J., in *ex parte James*, 9 Ch. at p. 614;

3 Ch. D., C. A., at p. 357; *per cur.* in *Daniell v. Sinclair*, 6 App. Cas. at p. 190.

Innocent misrepresentation causing mistake.

Earl Beauchamp v. Winn.

Rule in equity.

The law as to misrepresentation of fact was thus stated by Blackburn, J., in delivering the judgment of the court in *Kennedy v. The Panama Mail Company*.^(o) "There is a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show *that there is a complete difference in substance* between what was supposed to be and what was taken, *so as to constitute a failure of consideration*. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an *honest misrepresentation* as to its soundness, *though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error*, yet the purchaser *must pay the whole price*, unless there was a warranty: and even if there was a warranty, he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract, *Street v. Blay*."^(p) The learned judge then quotes the authorities from the civil law to the same effect, and concludes the passage by saying, "And as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is, to determine whether the mistake or misapprehension is *as to the substance of the whole consideration*, going as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

(o) L. R., 2 Q. B. 580-587.

(p) 2 B. & Ad. 456.

7. *Doggett v. Emerson*, 3 Story 700, 732; *Daniel v. Mitchell*, 1 Story 172. *Street v. Blay* was anticipated by the United States Supreme Court in *Thornton v. Wynn*, 12 Wheat. 183, where the same result was reached. But American decisions have greatly extended the remedy of avoidance or rescission, and in several States the statement of the text is not ac-

cepted as correct. The buyer, it is held, may rescind for any material misrepresentation, whether fraudulent or not. In the case supposed in the text, of a horse warranted sound, the buyer in those States would undoubtedly be held entitled to rescind the contract if the horse proved to be unsound. American decisions on this important subject are stated at the close of this chapter, § 623, *et seq.*

§ 615. In *Torrance v. Bolton*, (q) it was held that where a bidder at an auction was misled by the particulars advertised, as to the property exposed for sale, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe that he was buying the absolute reversion of the freehold and not an equity of redemption. No fraud was shown, but the court said, that the description in the particulars was "improper, insufficient, and not very fair." (Per James, L. J., 8 Ch., at p. 123.)

*Torrance v.
Bolton.*

This subject is further treated in the chapter on Warranty, Book IV., Part II., Ch. I.

§ 616. As to mistake or failure of consideration in a contract which was induced by an innocent misrepresentation of law, it was carefully considered by the Common Pleas in the two cases of *Southall v. Rigg* and *Forman v. Wright*, (r) and held to form a valid ground for avoiding a contract. 8

ad—Of law
*Southall v.
Rigg.*
*Forman v.
Wright.*

It is to be observed, however, that in both those cases, the mistake went in the above-quoted language of Mr. Justice Blackburn, "to the substance of the whole consideration," and it is apprehended that the right of rescinding a contract, on the ground of mistake of law induced by innocent misrepresentations, is subject to the same qualification and limitation as where there is a mistake of fact induced by the same cause, as explained in *Kennedy v. The Panama Mail Co.*, *supra*.

§ 617. In *Stevens v. Lynch*, (s) the drawer of a bill of exchange, knowing that time had been given to the acceptor without his, the drawer's, assent, but ignorant that in law he was thereby discharged, promised to pay the bill, and he was held bound. This case was cited in *Forman v. Wright*, but *Williams, J.*, simply said, (t)

*Stevens v.
Lynch.*

(q) 14 Eq. 124; 8 Ch. 118.

(r) Both reported in 11 C. B. 481; 20 L. J., C. P. 145. See, also, *Rushdall v. Ford*, 2 Eq. 750.

8. Mistake of Law.—See *ante* note 6. In *King v. Doolittle*, 1 Head 77, it was held that in a suit to rescind a contract, a party might plead ignorance of a private act of the legislature, and of the laws of another state. So where a bank charter was sold, which both parties believed to be indefeasible, but which in fact was

held at the mere pleasure of the legislature, by a reservation in the charter not contained in the copy shown to the parties, the sale was annulled by the Court of Chancery. In *Burt v. Bowles*, 69 Ind. 1, it was held that fraud or mistake could not be inferred from false representations of the law, for every one must be presumed to know it. See *American Ins. Co. v. Capps*, 4 Mo. App. 571.

(s) 12 East 38.

(t) 20 L. J., C. P., at p. 149.

"That is a very different case;" the difference being apparently this, that in the case of *Forman v. Wright*, the defendant had never owed the money at all, so that his error went "to the substance of the *whole* consideration," whereas, in *Stevens v. Lynch*, the defendant had been indebted to the plaintiff for a good consideration, and although the law discharges a surety where time is given to the principal debtor without the surety's assent, yet this is done on the ground that the condition of the surety is generally thereby altered; and *non constat* that in *Stevens v. Lynch*, the defendant's condition was really altered. Certainly the *whole* consideration of his promise to pay was not the mistake of law, inasmuch as the promise was manifestly based in part on the original consideration received when the bill was drawn.

In the case of *Beattie v. Lord Ebury*, (u) there is an elaborate discussion of the law on this subject in its application to the case of an agent honestly representing himself to have an authority which he does not possess, and Mellish, L. J., in delivering the judgment of the court, expressed a very strong opinion, that if in such a case the written power was shown by the agent, he would not be responsible for the innocent misrepresentation of its legal effect.

§ 618. As early as 1797, it was held by the King's Bench to be settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration, and recover in an action for money had and received, if the vendor failed to comply with his entire contract. (x) A buyer may recover, on the same ground, the price paid to the seller who has warranted title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to deliver them up to the true owner. (y) And even without such warranty, it has been said to be the undoubted right of a buyer to recover back his money paid on the ordinary purchase of a chattel, where he does not get that for which he paid; (z)⁹ but this subject of failure of title is more elaborately

Failure of consideration.

Where vendor fails to complete contract.

Where title fails after warranty by vendor;

Or even without warranty in sale of a chattel.

(u) 7 Ch. 777 at p. 800; S. C., L. R., 7 H. L. 102.

(x) *Giles v. Edwards*, 7 T. R. 181.

(y) *Eichholtz v. Banister*, 17 C. B. (N. S.) 708; 34 L. J., C. P. 105.

(z) *Per cur.* in *Chapman v. Speller*, 14 Q. B. 621, and 19 L. J., Q. B. 241.

9. *Burt v. Bowles*, 69 Ind. 1, 7; *Howe Machine Co. v. Willis*, 85 Ill. 333; *Minneapolis Harvester Works v. Holly*, 27 Minn. 495. In *Thomas v. Knowles*, 128 Mass. 22, the seller of a ship agreed to buy it back at the end of the voyage. After the ship started on another voyage,

treated, *post*, Book IV., Part II., Ch. I., § 2, on Implied Warranty of Title. And the same right exists in favor of the buyer where he has paid money for forged scrip in a railway: (a) or for forged bills or notes: (b) or for an article different from that which was described in the sale, as is shown *post*, in Book IV., Part I., on Conditions. (c)

Where forged securities have been bought.

§ 619. Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed. (d) So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration; (e) or for an unstamped bill of exchange which purports to be a foreign bill, and turns out to be worthless because really a domestic bill, invalid without a stamp, (f) he may rescind the contract for failure of consideration. 10

Purchase of shares in a projected company.

Invalid bill.

Unstamped security.

the buyer tendered a bill of sale, and brought suit for breach of the agreement, but the vessel had become a wreck at the time of the tender, and it was held that the suit would not lie.

(a) *Westropp v. Solomon*, 8 C. B. 345.

(b) *Jones v. Ryder*, 5 Taunt. 488; *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J., Q. B. 46; *Woodland v. Fear*, 7 E. & B. 519; 26 L. J., Q. B. 202.

(c) See notes to *Chandelor v. Lopus*, 1 Sm. L. C. (ed. 1879) 183.

(d) *Kempson v. Saunders*, 4 Bing. 5.

(e) *Burchfield v. Moore*, 3 E. & B. 683; 23 L. J., Q. B. 261.

(f) *Gompertz v. Bartlett*, 2 E. & B. 849; 23 L. J., Q. B. 65.

10. Invalid Securities.—In *Wood v. Sheldon*, 42 N. J. L. 421, the subject of sale was a certificate for a scrip dividend. This was adjudged void by the Court of Chancery, whereupon the buyer brought suit to recover back the price paid by him, and a judgment in his favor was sustained in the Court of Errors and Appeals. *Beasley, C. J.*, cited *Gompertz v. Bartlett*, 2 E. & B. 849, and said: "Both parties to the present contract thought that the

vendee was obtaining a valid obligation of this gas company, binding them to pay this large sum of money; instead of this, a nullity was passed to him." *Thrall v. Newell*, 19 Vt. 208, was also approved. In that case a note was sold, the maker of which, as it afterwards appeared, was insane when he signed it. The buyer was held entitled to recover back the price. In *Littauer v. Goldman*, 72 N. Y. 506, the sale was by delivery of a note void for usury. It was held that the seller, who had no knowledge of the defect, could not be held liable. *Miller, J.*, reviews the cases and concludes that there can be recovery, in case of sale of a note, only where the seller's title fails or where the instrument is forged. In *Wood v. Sheldon*, *Beasley, C. J.*, distinguishes *Littauer v. Goldman*, as applying only to sales of negotiable paper, but he says: "This judgment is admittedly supported by no precedent, and if we reason by analogy, there seems to be strong ground to call it in question." In support of the general principle that a contract for purchase of a chose in action may be avoided if the chose proves worthless, we cite further.

§ 620. But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out worthless.¹¹ Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority; upon proof offered that the scrip was the

No failure of consideration where buyer gets what he really intended to buy, even if it turn out worthless.

Marvin v. Jarvis, 20 N. Y. 226; *Webb v. Odell*, 49 N. Y. 583; *Ross v. Terry*, 63 N. Y. 613; *Whitney v. National Bank of Potsdam*, 45 N. Y. 305; *Bell v. Dagg*, 60 N. Y. 530; *Orand v. Mason*, 1 Swan 196; *Dumont v. Williamson*, 18 Ohio St. 515; *Aldrich v. Jackson*, 5 R. I. 218; *Terry v. Bissell*, 26 Conn. 23; *Hurd v. Hall*, 12 Wis. 112, 135; *Paul v. City of Kenosha*, 22 Wis. 266; *Giffert v. West*, 33 Wis. 617; *Snyder v. Reno*, 38 Iowa 329; *Lobdell v. Baker*, 1 Metc. 193; *Merriam v. Wolcott*, 3 Allen 258. See *ante* § 53.

11. Where Buyer gets all he Bargained for.—“If a party gets all he knowingly contracts for, he will not be allowed to plead that he got no consideration.” *Neidefer v. Chastain*, 71 Ind. 363, 368. Where goods are sold as an estimated quantity, more or less, the parties having equal opportunity to estimate the amount, there can be no avoidance if the quantity turns out to be greater or less than the estimate. Thus in *McCrea v. Longstreth*, 17 Penna. 316, the purchaser of a farm, bargained for the produce on it, and on an estimate of quantity of the various chattels, paid \$1800 therefor, the seller expressly providing that the estimated quantities were not guaranteed to be accurate. The buyer brought suit to recover back part of the price, alleging that there was an over-estimate of forty per cent., but he was non-suited on writ of error. *Lewis, J.*, said: “We infer from the transaction that the quantities were unknown to either party, each having equal advantages in making the estimate, and neither having the power to arrive at certainty with regard to the quantity of wheat, rye and oats, as measurement of grain in the straw is impossible. * * The parties

ought certainly to be permitted to make their bargains upon an estimate of quantity, and having done so, each exercising his judgment with equal means for forming an opinion, and both agreeing that an error in the estimate shall not be made the foundation of an action, the courts have no right to disturb their arrangements in violation of their contract. After the whole contract has been fully executed by the parties, the expression adopted by *Yeates, J.*, in *Steinbauer v. Witman*, 1 S. & R. 448, is peculiarly applicable, ‘the funeral has passed by.’” In *Sankey v. First National Bank of Mifflinburg*, 78 Penna. 48, the cashier of a bank bought bonds at par, both the cashier and seller supposing that to be their market value. In fact the time to redeem them had been extended, and they were at a premium of six per cent., and on learning this fact the seller sued for the premium. It was held that no action would lie. *Williams, J.*, said: “The mistake or ignorance of the parties in regard to the premium was not of the essence of the contract, or its procuring cause.” In *Wheat v. Cross*, 31 Md. 99, 104, the sale was of a horse in the possession of the buyer at the time of the sale. The offer was sent and accepted by mail, but before the acceptance was received the buyer wrote withdrawing the offer because the horse was found to be diseased. The court said that the mistake was of a matter wholly collateral, and the sale could not be avoided. See *Hunter v. McLaughlin*, 43 Ind. 38; *Gaylord Manufacturing Co. v. Allen*, 53 N. Y. 515; *Brown v. Fagan*, 71 Mo. 563; *Bryant v. Pember*, 45 Vt. 487.

only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, *held*, that the buyer had got what he really intended to buy; and could not rescind the contract on the ground of a failure of consideration. (g)

Lamert v. Heath.

[And so where a person bought the exclusive right of using a patent in a foreign country, being aware at the time of the purchase that no exclusive right to use the process there could be obtained, but desiring an ostensible grant of the exclusive right, with the object of floating a company: it was held, that having obtained what he desired and intended to buy, he could not recover the purchase money on the ground that the consideration had failed. (h)]

Begbie v. Phosphate Sewage Co.

§ 621. Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, as in *Giles v. Edwards*, (i) and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some other form of action. Thus, in *Harnor v. Groves*, (k) a purchaser of fifteen sacks of flour having, after its delivery to him, used half a sack, and then two sacks more, was held not entitled to rescind the contract, on the ground of a failure of consideration, and to

Partial failure of consideration.

Where contract is entire, buyer may reject the whole.

But not if he has accepted part.

Harnor v. Groves.

Sale of a Worthless Patent.—Whether on a sale of a patent which proves to be worthless, there is a failure of consideration, depends not on the utility or pecuniary value of the patent but solely on its validity. This validity may be questioned on such an issue, in the same manner as in a suit for infringement; and it may be shown that the patent ought not to have been granted. "Letters patent of the United States can be lawfully granted only for new and useful inventions, and are but *prima facie* evidence of the novelty and utility of the invention described." *Gray, J.*, in *Nash v. Lull*, 102 Mass. 60. And in that case the charge that if the invention could be

be deemed a useful invention, though its use was not profitable, was held correct. This was approved in *Green v. Stewart*, 7 Baxter 418. See *Cowan v. Dodd*, 3 Coldw. 278; *Shepherd v. Jenkins*, 73 Mo. 510; *Harlow v. Putnam*, 124 Mass. 553; *McKee v. Eaton*, 26 Kan. 226; *Lester v. Palmer*, 4 Allen 145. But see, *contra*, *Gray v. Billington*, 21 U. C. C. P. 288.

(g) *Lamert v. Heath*, 15 M. & W. 487. See, also, *Lawes v. Purser*, 6 E. & B. 930; 26 L. J., Q. B. 25.

(h) *Begbie v. Phosphate Sewage Co.*, L. R., 10 Q. B. 491; affirmed, 1 Q. B. D. 674, C. A.

(i) 7 T. R. 181, *ante* § 618. See *Whincup v. Hughes*, L. R., 6 C. P. 78.

(k) 15 C. B. 669; 24 L. J., C. P. 53.

return the remainder, although he had made complaint of the quality as not equal to that bargained for, as soon as he had tried the first half sack. So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration for part of the price paid; not, as in the case of the flour, a *partial* failure of the whole. This was held, in *Devaux v. Connolly*, (1) where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons, and the other of 150 tons, and the parcels turned out to be only 2½ tons and 132½ tons respectively.

§ 622. On the other hand, if the thing sold is such in its nature as not to be severable, and the buyer has enjoyed any part of the consideration, for which the price was paid, he is no longer at liberty to rescind the contract. 12 Thus, in *Tay-*

Where thing sold is not severable, and buyer has enjoyed part of

(1) 8 C. B. 640.

12. *Partial Failure of Consideration. Severable Contract.*—In *Norris v. Harris*, 15 Cal. 226, 256, the sale was made in California of property in Texas, including nine negroes, for \$6000; 250 horses for \$9000, and 7000 cattle for \$56,000. The buyer finding less property in Texas than he had bargained for, brought suit in California to rescind the contract and to recover the consideration which he had paid. Field, C. J., said: "In the present case the contract includes three items—the slaves, the horses and the cattle. As to the slaves, the contract is clearly entire. A gross sum is fixed for the whole number, and no means for determining the price for each one is afforded, and hence the agreement is implied that the whole are to be taken or none. As to the horses and cattle, a possible deficiency in their number was in the contemplation of the parties at the time, and hence provision for compensation per head was provided to meet such

deficiency. The failure, then, to deliver the whole number of horses and cattle did not invalidate the contract as to them, but the sale of the three slaves, and the consequent inability to deliver the whole number, would have that operation as to the item of slaves were it not for the subsequent and independent stipulation by the parties, by which provision was made for the sales which might take place before the news of the transfer could be received by the agent of the defendants. That stipulation obviates the objection on that ground." Accordingly, the court refused to rescind, but left the buyer to his remedy at law for damages. In *Richards v. Shaw*, 67 Ill. 222, the seller delivered only 391 bushels of corn in fulfillment of a contract to deliver 500; but it was held that he might recover, on an implied contract, the fair value of the corn delivered, less damages for failure to fulfill. This is the modern doctrine, though rejected in New York, unless the buyer has waived entire performance. *Avery v.*

lor v. Hare, (m) where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that he could not maintain an action for rescission of the contract and return of the price, on the ground of failure of consideration; and this case was followed by the King's Bench half a century later in Lawes v. Purser, (n) where the facts as pleaded were almost identical with those in Taylor v. Hare.

the consideration.

Taylor v. Hare.

Lawes v. Purser.

In Chanter v. Leese, (o) the Exchequer Chamber, in the case of a sale of six patents for one consideration, five of which were valid, and one void, held, that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore, that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely*; and it follows that no action can be maintained for the money." The court further stated that even if the five patents had been enjoyed, they

Chanter v. Leese.

Wilson, 81 N. Y. 341. In Morgan v. McKee, 77 Penna. 228, the contract was for eight monthly deliveries of oil, payment to be made on each delivery. The fourth delivery not being made, the buyer declared the contract rescinded; but the court held that the contract was manifestly severable, each delivery and payment being a separate contract, and that the contract was not rescinded. See Costigan v. Hawkins, 22 Wis. 74. Cole, J., said that the contract of sale before the court, being severable, might be enforced as to part and rescinded as to the residue, and the price paid for such part of the consideration as had failed, be recovered back. On a rescission where one party has received benefit from the contract, slight evidence will raise an implied promise to pay for it. Knauss v. Shiffert, 58 Penna. 152. Where part of the price

of goods was paid in a worthless note represented to be good, it was held that the seller, on return of the note, could sue for that part of the price represented by the note, without returning the rest of the price received. Martin v. Roberts, 5 Cush. 126. In Young, & Co. v. Wakefield, 121 Mass. 91, a number of distinct articles were bought at one time for separate prices, but after some had been sold by the buyer, he returned the rest as not answering the warranty. On a suit for the price, it was held that the contract was not entire, and the buyer might therefore rescind as to any of the separate purchasers, for cause, without rescinding as to all.

(m) 1 B. & P. N. R. 260.

(n) 6 E. & B. 930; 26 L. J., Q. B. 25.

(o) 5 M. & W. 698.

were of opinion that no action could be maintained *on the agreement*, though possibly a remedy might exist in some other form of action.*

SECTION II.—AVOIDANCE FOR BREACH OF WARRANTY. AMERICAN DECISIONS.

§ 623. It was formerly held in England that the buyer of property warranted as to quality, could avoid the contract for breach of the warranty. See *post* § 628. But modern decisions have restricted this remedy to cases where the warranty was fraudulent, that is, where the seller was aware of the defects against which he warranted, and concealed them. See *post* § 638, and *ante* § 614.

On this subject the American courts have divided, a part holding that there can be no avoidance or rescission of the contract for mere breach of warranty without fraud, and the others holding that the buyer is entitled to property of the quality contracted for, and may return it and rescind the contract for breach of warranty, whether there was fraud or not on the part of the seller. The former class will be first considered.

The modern English rule has been approved in New York and Pennsylvania, and in an early case in the United States Supreme Court, and may perhaps be said to be sustained by the greater weight of authority.

§ 624. In *Thornton v. Wynn*,¹³ (1827), the question arose in the United States Supreme Court. A horse was sold and warranted. On a suit for the price the buyer proved ^{Federal courts.} breach of warranty and offer to return the horse. Washington, J., said: "If the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time." This restricts the right to rescind to cases of fraudulent representations. In *Lyon v. Bertram*,¹⁴ (1857), the same court refer to a statement in Smith's Leading Cases, notes to *Cutter v. Powell*, that on discovery of a breach of warranty the buyer "may refuse to receive the article at all," and say that this is an open question. *Thornton v. Wynn* is

*The rest of this chapter is by the American editor.

13. 12 Wheat. 183, 193.

14. 20 How. 149, 154.

cited, but the question is not decided. Since that time neither of these cases appears to have been cited in the United States Supreme Court.

§ 625. *Thornton v. Wynn* was followed in Pennsylvania in the case of *Kase v. John*.¹⁵ A machine was sold and warranted, but not answering the purpose was returned and suit brought to recover back the price. In the absence of any proof of knowledge by the vendor of the defects of the machine, it was held that the buyer could not rescind, but was limited to an action for breach of warranty. This is still the law in Pennsylvania, as appears from the case of *Freyman v. Knecht*,¹⁶ where it is held that in the absence of fraud the buyer cannot rescind for breach of warranty, and *Kase v. John* is followed.

§ 626. In New York the English law as declared in the case of *Street v. Blay*,¹⁷ was followed in the case of *Voorhees v. Earl*,¹⁸ in which Cowen, J., said: "Where there is a warranty on a sale of goods, without fraud, and no stipulation in the contract that the goods may be returned, the vendee has no right to annul the contract without the consent of the vendor." This statement of the law was reiterated by the same judge in *Cary v. Gruman*,¹⁹ and these cases were mentioned as "well considered" by Comstock, J., in *Muller v. Eno*,²⁰ and have been often cited. In *Day v. Pool*,²¹ Peckham, J., said: "It seems to be regarded as settled in this state, though perhaps not necessarily determined in any case, that the vendee has no right to return the goods in such case (of breach of warranty) unless there was fraud in the sale."

§ 627. In Illinois the English case of *Street v. Blay*, and the New York case of *Voorhees v. Earl*, above stated, were approved in *Doane v. Dunham*,²² but the Massachusetts rule seems to have been since followed. See *post* § 632.

In Texas, the rule that a contract of sale cannot be rescinded for breach of warranty without fraud has been adopted,²³ and this is the doctrine in Vermont and Missouri, where the United States Supreme Court case of *Thornton v. Wynn* was followed,²⁴ and there is a recent

15. 10 Watts 107.

16. 78 Penna. 141, 144.

17. 2 B. & Ad. 456.

18. 2 Hill. 288, 291.

19. 4 Hill 625.

20. 14 N. Y. 597, 601.

21. 52 N. Y. 416. To the same effect, see *Rust v. Eckler*, 41 N. Y. 488, 491.

22. 65 Ill. 512.

23. *Wright v. Davenport*, 44 Tex. 164, 168.

24. *West v. Cutting*, 19 Vt. 536; *Walls*

dictum to the same effect in Minnesota.²⁵ The same rule is established in Georgia,²⁶ Connecticut,²⁷ Kentucky²⁸ and North Carolina.²⁹

§ 628. The opposite opinion, namely, that the buyer may rescind the sale if the article sold does not answer the warranty, whether fraudulent or not, was held by Lord Eldon in *Curtis v. Hannay*,³⁰ and though overruled in England (see *ante* § 614), has been adopted in Massachusetts and other states.

In Massachusetts the law was stated in *Bradford v. Manly*³¹ (1816). That was a sale by sample, and Parker, C. J., said: *Massachusetts rule differs.* "That the thing is the same as that which he (the seller) shows for it, he certainly undertakes, and if a different thing is delivered, he does not perform his contract, and must pay the difference or receive the thing back and rescind the bargain if it is offered him." There was a similar *dictum* by Morton, J., in *Perley v. Balch*,³² (1839); and in *Dorr v. Fisher*,³³ (1848), Shaw, C. J., said: "A warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon breach thereof, rescind the contract and recover back the amount of his purchase money, as in the case of fraud; but if he does this he must first return the property sold."

§ 629. In *Bryant v. Isburgh*,³⁴ (1859), the precise question as stated by Metcalf, J., was whether a purchaser "can rescind the contract and return the property, for breach of warranty, when there is no fraud and no express agreement that he may do so." After referring to the cases cited by counsel, showing the law in England, New York and Pennsylvania, and in the United States Supreme Court,³⁵ Metcalf, J., said that by the law of Massachusetts as understood for more than forty years, "he to whom property is sold with an express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty by a seasonable return of the property,

v. Gates, 6 Mo. App. 242, 246. But see *Richardson v. Grandy*, 49 Vt. 22.

25. *Knoblauch v. Krouschnabel*, 18 Minn. 300.

26. *Clark v. Neufville*, 46 Ga. 261; *Damson v. Penniman*, 65 Ga. 698.

27. *Buckingham v. Osborne*, 44 Conn. 183.

28. *Lightburn v. Cooper*, 1 Dana 273. See *Phelps v. Quinn*, 1 Bush 375.

29. *Lewis v. Rountree*, 78 N. C. 323, 327.

30. 3 Esp. 82.

31. 13 Mass. 139.

32. 23 Pick. 283.

33. 1 Cush. 271, 274.

34. 13 Gray 607.

35. *Thornton v. Wynn*, 12 Wheat. 183; *Voorhees v. Earl*, 2 Hill 288; *Kase v. John*, 10 Watts 107; *Street v. Blay*, 2 B. & Ad. 456, all stated *supra*.

and thus entitle himself to a full defence to a suit brought against him for the price of the property, or to an action against the seller to recover back the price if it have been paid to him." The law thus declared has been since recognized and followed in Massachusetts.³⁶

§ 630. In Maine the same conclusion was reached independently in *Marston v. Knight*,³⁷ the court refusing to follow *Street v. Blay*,³⁸ and preferring the older decision of *Curtis v. Hannay*.³⁹ *Wells, J.*, said: "There does not appear to be any good reason why a purchaser should be compelled to retain a chattel purchased upon a warranty which is broken and be put to his action for damages when it may be unsuitable to his wants. He relies upon the warranty, and the breach is equally injurious to him whether the seller acted in good or bad faith." The case was one of exchange of horses, and the plaintiff finding that the horse received by him did not answer the warranty, tendered him back and then brought replevin for the horse he had delivered, and he recovered.⁴⁰

§ 631. In *Fisk v. Tank*,⁴¹ *Dixon, C. J.*, said that many respectable authorities hold that if a warranty is not complied with the vendee may refuse to receive the article, or may keep it long enough for examination and then return it and recover back the price. That question, however, the court reserved.

In *Woodle v. Whitney*,⁴² machines were made and delivered, and, being found defective, were returned. The court held that the price paid could be recovered back.

In *Boothby v. Scales*,⁴³ the sale was of a fanning-mill, warranted, and *Dixon, C. J.*, said: "It is well settled in this state, as in several others, that for a breach of warranty without actual fraud on the part of the vendor, the purchaser is entitled to rescind the contract, and for that purpose may return the goods, or what is the same thing, offer to return them within a reasonable time." The same principle has since been repeatedly declared in Wisconsin.⁴⁴

§ 632. In *Howe Machine Co. v. Rosine*,⁴⁵ the sale was of a machine

36. *Boardman v. Spooner*, 13 Allen 353, 361; *Young, &c., Co. v. Wakefield*, 121 Mass. 91; *Morse v. Brackett*, 98 Mass. 205.

37. 29 Me. 341.

38. 2 B. & Ad. 456.

39. 3 Esp. 82.

40. See *Cutter v. Gilbreth*, 53 Me. 176.

41. 12 Wis. 276, 303.

42. 23 Wis. 55.

43. 27 Wis. 626, 636.

44. This right to rescind was recognized in *Merrill v. Nightingale*, 39 Wis. 247, 250; in *Fairfield v. Madison Manufacturing Co.*, 38 Wis. 346; *Churchill v. Price*, 44 Wis. 540, and in *Warder v. Fisher*, 48 Wis. 338, 341.

45. 87 Ill. 105.

Illinois. sold as new, but in fact old. The seller agreed to substitute new parts but did not do so. The buyer tendered a return of the machine and demanded back his note for the price. It was held that a verdict for the buyer in a suit on the note was right.

In *Sparling v. Marks*,⁴⁶ a stone was sold as a diamond, but proved to be only a crystal. The buyer on tendering back the stone was held entitled to rescind the contract and recover back the price, which he had paid. This last case is discussed purely as a case of warranty, but both of these cases may perhaps be classed as cases where there was a breach of the conditions of the sale. The right to rescind for breach of warranty by returning the property warranted is recognized in two recent decisions in the Illinois intermediate Court of Appeals.⁴⁷

§ 633. There are several early cases in Maryland sustaining the right to rescind for breach of warranty, though in none of them perhaps was it strictly necessary for the court to pass on that question. In *Franklin v. Long*,⁴⁸ (1836), Buchanan, C. J., said: "It is the received doctrine in this state, though otherwise decided elsewhere, that if a person sells an article, as a horse, with a warranty of soundness, which turns out to have been unsound, the buyer may either keep the horse and bring an action on the warranty, or rescind the contract by a return of the horse, or offer to return him, in a reasonable time, so that the seller may be placed *in statu quo*, and sue for and recover back the purchase money, in an action for money had and received." This principle was applied in *Taymon v. Mitchell*,⁴⁹ and has since been recognized in that state.⁵⁰

§ 634. The foregoing decisions were followed in Iowa in the case of *Rogers v. Hanson*.⁵¹ In that case the buyer gave his notes and a mare for a threshing machine, which was warranted. The machine not answering the warranty the buyer returned it and demanded back his notes and the mare. Not receiving them he brought suit, and the court ordered the contract to be rescinded and the notes and the mare to be returned. On appeal Day, J., referred to the conflict of authority, cited *Massachusetts*, *Maine* and *Maryland* decisions, and said: "The doctrine of the *Massachu-*

46. 86 Ill. 125.

47. *Prickett v. McFadden*, 8 Ill. App. 197; *Mathews v. Fuller*, 8 Ill. App. 529.

See, also, *Ruff v. Jarrett*, 94 Ill. 475, 479.

48. 7 Gill & J. 407, 419. See *Rutter v.*

Blake, 2 Harr. & J. 353; *Hyatt v. Boyle*, 5 Gill & J. 110.

49. 1 Md. Ch. 496, 501.

50. *McKeney v. Duvall*, 21 Md. 166;

Lane v. Lantz, 27 Md. 211.

51. 35 Iowa 283.

setts cases, though perhaps not sustained by the greater number of authorities, is, to our minds, the more reasonable and just. We know of no satisfactory reason why one who desired a good article, and is willing to pay a price which will command it, should be required to keep an inferior article at a lesser price. Such a construction of the law substitutes for the party's contract an agreement which he did not make, and requires him to accept an article which he would not have purchased if he had known of its defects." In *Jack v. Des Moines, &c., Co.*,⁵² it was held that where wheat was ordered and shipped to the buyer, he might reject it because it was not, as agreed, "good milling wheat," and recover back the price paid by him, notwithstanding he had paid freight. Referring to *Rogers v. Hanson*, above stated, the court said: "Our prior decision upon this question, counsel vigorously assail. Our confidence in its correctness is not shaken."

Some support to the same doctrine may be found in cases in the reports of Ohio, Alabama, Arkansas, Indiana and other states, referred to in the note,⁵³ though perhaps most of these decisions may be explained on other grounds. See, also, *post* § 638, note 4.

§ 635. It is undoubted law, that if property not specific is contracted for, and warranted to possess certain qualities, and inferior property is tendered, the buyer may refuse to receive it, and may return it after examination or trial.⁵⁴ On the same principle, where property is sold by sample, it is one of the conditions of the contract that the buyer may examine the bulk when tendered, and reject the property when not equal to the sample. This right closely resembles the right to rescind, for if goods so sold are accepted, title is considered to have vested at the time of the appropriation of them to the buyer, as, for example, by delivery to a carrier.⁵⁵ This subject is discussed *post*, chapters on "Conditions" and "Warranty."

52. 53 Iowa, 399, 402. See *Clarke v. Rice*, 1 Bailey 648. *McGetchie*, 49 Iowa 487.

53. *Beresford v. McCune*, 1 Cinn. Super. Ct. 50; *Byers v. Chapin*, 28 Ohio St. 300; *Rogers v. Niles*, 11 Ohio St. 48; *Barnett v. Stanton*, 2 Ala. 181; *Blackman v. Johnson*, 35 Ala. 252; *Perry v. Johnston*, 59 Ala. 648, 653; *Plant v. Condit*, 22 Ark. 454, 458; *Righter v. Roller*, 31 Ark. 170, 173; *Wynn v. Hiday*, 2 Blackf. 123; *Dill v. O'Ferrell*, 45 Ind. 268; *Byers v. Bosstick*, 2 Mills 76; *Trimmier v. Thomson*, 10 S. C. 164, 187; *Smith v.*

54. *Kimball, &c., Co. v. Vroman*, 35 Mich. 310, 330; *Bigger v. Bovard*, 20 Kan. 204; *Knoblauch v. Krouschnebel*, 18 Minn. 300; *Polhemus v. Heiman*, 45 Cal. 573.

55. *Boothby v. Plaisted*, 51 N. H. 436; *McMarty v. Gordon*, 16 Kan. 35; *Gill v. Kaufman*, 16 Kan. 571; *Dike v. Reitlinger*, 23 Hun 241; *Webster v. Granger*, 78 Ill. 230; *Merriman v. Chapman*, 32 Conn. 146; *Gatling v. Newell*, 9 Ind. 572.

CHAPTER 'II.

FRAUD.

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SECTION I.—IN GENERAL.

§ 636. Fraud renders all contracts *voidable ab initio* both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent.¹

Although fraud has been said to be “every kind of artifice employed by one person for the purpose of deceiving another,” courts and lawgivers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.²

1. Bank of Georgia v. Higginbottom, 9 Pet. 48; Duncan v. McCullough, 4 S. & R. 483.

2. In Pennsylvania, the fraud, to avoid a sale, must be “actual artifice, intended

and fitted to deceive.” Smith v. Smith, 21 Penna. 367, 372; Rodman v. Thalheimer, 75 Penna. 232, 237. See, also, Dambmann v. Schulting, 75 N. Y. 55.

The Roman juriconsults attempted definitions, two of which are here given: "*Dolum malum* SERVIVS quidem ita definit *machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur.* LABEO autem, posse et sine simulatione id agi ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena: Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum decipiendum alterum adhibitam. *Labeonis definitio vera est.* Dig. l. iv., t. 3, l. 1, § 2.

Roman juriconsults.

The Civil Code of France, without giving a definition, provides, in art. 1116: "Fraud is a ground for avoiding a contract when the devices (*les manœuvres*) practiced by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

Civil Code of France.

§ 637. However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said at common law to have been defrauded. In the first place it is essential that the means used should be successful in *deceiving*. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and see through the artifices or devices. *Haud enim decipitur qui scit se decipi.* If a contract is made under such circumstances, the inducement or motive for making it is *ex concessis*, not the false or fraudulent representations, which are not believed, but some other independent motive. [And even if the one party is unaware of the truth, yet if the artifices adopted by the other has not induced him to enter into the contract, that is to say, if the fraud is not *fraus dans locum contractui*, he will not be entitled to relief.]⁸

No fraud unless party is deceived.

Or unless contract is induced thereby.

3. The Fraud Must Have Induced the Sale.—In *Gregory v. Schenell*, 55 Ind. 101, 106, the seller of mules replevied them on charge of fraudulent representations by the buyer as to his solvency, when the sale was made on credit. Bidle, J., said: "In such a case to establish fraud and authorize a rescission of the contract for that cause, the representations

made must have been such as were calculated to deceive a person of common prudence; they must have been false, and known to be false, at the time, by the person who made them; and the person to whom they were made must have believed them to be true and relied upon them; and they must have been the inducement which caused him to part with his prop

erty. A fraud by which no one is deceived, is harmless in law." Artifices which do not deceive do not warrant an avoidance of the contract. *Phipps v. Buckman*, 30 Penna. 401; *Clark v. Everhart*, 63 Penna. 347; *Weist v. Grant*, 71 Penna. 95; *Hanna v. Rayburn*, 84 Ill. 533; *McDonald v. Trafton*, 15 Me. 225; *Bowman v. Carithers*, 40 Ind. 90; *Frenzel v. Miller*, 37 Ind. 1, 17; *Merwin v. Arbuckle*, 81 Ill. 501; *Gunby v. Sluter*, 44 Md. 237, 247; *Hagee v. Newton*, 59 Ga. 113; *Todd v. Fambro*, 62 Ga. 664; *Cochrane v. Halsey*, 25 Minn. 52, 63; *Parker v. Marquis*, 64 Mo. 38, 42; *Sledge v. Scott*, 56 Ala. 202, 206.

Misrepresentation of the Law.—On the same principles it was held in *Burt v. Bowles*, 69 Ind. 1, that fraud could not be predicated on false statements of the law, for the party to whom such representations were made could not be deceived thereby, because he must be conclusively presumed to know the law. In *Upton v. Tribilcock*, 91 U. S. 45, 50, *Hunt, J.*, said: "That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled." In *Rawson v. Harger*, 48 Iowa 269, the seller represented that he had a valid patent. It was held that the only fact thus stated was that he had a patent. Its validity was a question of law, and a misstatement as to the validity was held not fraudulent. But this may be doubted, for the validity of a patent depends on its novelty, and that is a question of fact. See *ante* § 620, note 11. In the case of *Ins. Co. v. Reed*, 33 Ohio St. 283, 293, the same principle was declared, where the fraud was that of an insurance agent who procured a settlement of a loss by false representations that the loser could not recover, because of forfeiture by breach of conditions. See *Fish v. Clelland*, 33 Ill. 243; *Clem v. Newcastle, &c., R. R.*, 9 Ind. 488; *Rose v. Hurley*, 39 Ind. 77, 82; *Dailey v. Jessup*, 72 Mo. 144; *Clodfelter v. Hulett*, 72 Ind. 137, 143. Compare

however, the above-stated Ohio case of *Ins. Co. v. Reed*, with the very similar case of *Tabor v. Mich. Mut. Life Ins. Co.*, 44 Mich. 324, 331. *Campbell, J.*, said that the doctrine which makes parties bear the consequence of mistake of law is hard in many cases, that forfeiture of an insurance policy is a mixed question of law and fact, and there being circumstances of imposition, a surrender of a policy was set aside. A misrepresentation of private acts or foreign laws may be fraudulent. See *ante* § 616, note 8.

The Fraud Need not be the Sole Inducement.—"It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough if they had material influence upon the plaintiff, though combined with other motives." *Colt, J.*, in *Safford v. Grout*, 120 Mass. 20, 25; *Matthews v. Bliss*, 22 Pick. 48; *Ruff v. Jarrett*, 94 Ill. 475, 480; *McAlear v. Horsey*, 35 Md. 439, 452; *Hersey v. Benedict*, 15 Hun 282, 287; *People v. Haynes*, 11 Wend. 557; *Winter v. Bandell*, 30 Ark. 363, 373.

Material Misrepresentations Will be Presumed to Have Induced the Sale.—On proof that representations were material and false, the burden will be thrown upon the party making them to show that they were not relied on by the other party. *Fishback v. Miller*, 15 Nev. 428, 443; *Kerr on Fraud and Mistake* 75; *Holbrook v. Burt*, 23 Pick. 546, 552.

Pretended Assent Given, to Detect Fraud.—In *Koyce v. Watrous*, 7 Daly 87, on appeal, 73 N. Y. 597, the buyer attempted to procure goods by giving in payment worthless notes which he represented to be good. The seller having discovered the fraud, accepted the notes and used them as evidence of the fraud on a criminal complaint, and refused to deliver the goods. He was sued for damages for breach of contract, and the judge on the trial directed a verdict against him, because the seller had not been deceived and had

§ 638. Next, it is now well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud*. Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no ground for avoiding it as *obtained by fraud*, if the party making the representation *honestly and on reasonable grounds* believed it to be true; although other remedies are sometimes available to the deceived party, *ante* § 605, *et seq.*, *post*, Warranty. 4

No fraud with-
out dishonest
intention: no
legal fraud in
sales.

§ 639. Lastly, there must be damage to the party deceived, even when there is a knowingly false representation, before a right of action can arise. "Fraud without damage, or damage without fraud, gives no cause of action," was the maxim laid down by Croke, J., in 3 Bulst. 95, and quoted with approval by Buller, J., in the great leading case of *Pasley v. Freeman*, (a) to which more particular attention will presently be drawn. 5

Fraud without
damage gives
no right of ac-
tion.

made the contract with his eyes open. But on appeal this was reversed, the court holding that there was no contract, the buyer having received the notes merely to obtain evidence, and not being estopped to deny the contract, because estoppel is never applied in aid of a fraudulent purpose.

4. There Must be Fraudulent Intent.—See *post* § 678, note 32. In *Comins v. Coe*, 117 Mass. 45, the buyer gave the seller a check for the property sold. The check was dishonored, not because the money was not on deposit to meet it, but because the bank had discovered frauds upon it by the buyer's forgeries and held the deposit to secure itself. Under these circumstances the seller brought a suit to recover the property sold, against the buyer's assignees. But the court held that these forgeries had no connection with the sale, and the fact that an incidental effect of their discovery was to prevent payment of the check, did not show fraud in the contract of sale. A statement made with false pretence of knowledge is fraudulent. See *post* § 691, and note.

False Representations Producing Mistake.—But although false statements

innocently made will not justify the avoidance of the sale for fraud, they may warrant its avoidance because of the mistake produced thereby. See last chapter, and see *Pendarvis v. Gray*, 41 Tex. 326, and *Lopes v. Robinson*, 54 Tex. 510. In *Smith v. Richards*, 13 Peters 26, the court said: "It was immaterial to the purchaser whether the misrepresentation proceeded from fraud or mistake. The injury to him is the same, whatever may have been the motives of the seller." This language was approved in *Grim v. Byrd*, 32 Gratt. 293, 300, and *Staples, J.*, said: "The real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract." See *Crump v. U. S. Mining Co.*, 7 Gratt. 352. To the same effect, see *Thorne v. Prentiss*, 83 Ill. 99; *Allen v. Hart*, 72 Ill. 106; *Ruff v. Jarrett*, 94 Ill. 475, 479.

(a) 3 T. R. 51; 2 Sm. L. C. 66, (8th ed.)

5. The Fraud Must be a Cause of Damage to the Party Deceived.—*Morrison v. Lods*, 39 Cal. 361, 385; *Weaver v. Wallace*, 9 N. J. L. 314, [251]; First

The whole doctrine on the subject was very much discussed in the House of Lords, in the celebrated case of *Atwood v. Small*; (b) and in Lord Brougham's opinion, the principles unanimously conceded to be true by their lordships are carefully laid down. (c)

§ 640. The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception. (d) ⁶

National Bank of Barnsville v. Yocum, 11 Neb. 328; *Neidefer v. Chastain*, 71 Ind. 363, 365; *Wiley v. Howard*, 15 Ind. 169; *Sledge v. Scott*, 56 Ala. 202, 206; *Fuller v. Hodgden*, 25 Me. 248; *Weist v. Grant*, 71 Penna. 95. In *Brown v. Blunt*, 72 Me. 415, 421, *Barrows, J.*, said: "The payment of plaintiff's own debt was no damage. It was not defrauding him to induce him to pay it by means of a false representation, had that been proved. Hence it is held in *Commonwealth v. McDuffy*, 126 Mass. 467, that the offence of obtaining property by false pretences cannot be committed when the party charged obtains no more than is rightfully due him; that the question in such cases is whether defendant had an intent to defraud, and effected that purpose." To the same effect see *Marsh v. Cook*, 32 N. J. Eq. 262. See *Bartlett v. Blaine*, 83 Ill. 25; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 196; *Clark v. Tennant*, 5 Neb. 549; *First National Bank v. Yocum*, 11 Neb. 328.

The Fraud Must be Material to the Transaction.—"If the representations relate to another matter, or to the one in dispute in but a trivial and unimportant manner, they would afford no sufficient ground to set aside the contract." *Hall v. Johnson*, 41 Mich. 236, 290; *Frenzel v. Miller*, 37 Ind. 1, 17; *First National Bank v. Yocum*, 11 Neb. 328; *Noel v. Horton*, 50 Iowa 687. In *McAleer v.*

Horsey, 35 Md. 439, 452, *Miller, J.*, said: "If the fraud be such that had it not been practiced the contract could not have been made or the transaction completed, then it is material to it; but if it be made probable that the same thing would have been done if the fraud had not been practiced, it cannot be deemed material. Whether material or otherwise, seems a question for the jury." See *Buschman v. Codd*, 52 Md. 202, 207.

(b) 6 Cl. & Fin. 232. The opinions delivered by some of the law lords in this case are considered and explained by *Jessel, M. R.*, in *Redgrave v. Hurd*, 20 Ch. D. 1, C. A., pp. 14-17.

(c) 6 Cl. & Fin. pp. 443-447. See, also, per Lord Wensleydale, in *Smith v. Kay*, 7 H. L. C., at p. 774.

(d) *Smith v. Hughes*, L. R., 6 Q. B. 597; and see an interesting case before the Supreme Court of the United States, *Laidlaw v. Organ*, 2 Wheat. 178.

6. In *Laidlaw v. Organ*, 2 Wheat. 178, 195, the buyer learned of the peace between Great Britain and the United States, and immediately bought tobacco, which he obtained more cheaply because the seller was ignorant of the news. The seller attempted to rescind. Chief Justice Marshall said: "The question is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee,

[There are, however, cases in which a non-disclosure of a material fact may be equivalent to active misrepresentation, for the withholding of that which is not stated may make that which is stated absolutely false. (e) Or, again, it may be that from the nature of the transaction, the fact not disclosed is such that it is impliedly represented not to exist. (f) ⁷

Silence may be equivalent to active misrepresentation.

§ 641. In general, where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are *Caveat emptor* and *Simplex commendatio non obligat*. The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects. If the buyer is unwilling to bargain on these

Caveat emptor is general rule.

ought to have been communicated by him to the vendor. The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other." See *Blydenburgh v. Welsh*, Baldw. 331, 337; *Butler's Appeal*, 26 Penna. 63, 66; *Kintzing v. McElrath*, 5 Penna. 467; *Perry v. Johnston*, 59 Ala. 648; *People's Bank v. Bogert*, 81 N. Y. 101, 108.

(e) Per Lord Cairns in *Peek v. Gurney*, L. R., 6 H. L., at p. 403. And this statement of the law has been approved and explained by James, L. J., in *Arkwright v. Newbold*, 17 Ch. D., C. A., at p. 317, and by Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D., C. A., at p. 58.

(f) Per Blackburn, J., in *Lee v. Jones*, 17 C. B. (N. S.) at p. 506, and *per eundem* in *Phillips v. Foxall*, L. R., 7 Q. B., at p. 679.

7. See *post* § 732, note 50. In *Devoe v.*

Brandt, 53 N. Y. 462, goods were bought on credit, no representation being made. A suit was pending against the buyer, and the plaintiff therein was entitled to judgment for more than the buyer was worth, but had delayed to enter judgment for more than a year prior to the sale to the buyer. Immediately after that sale the creditor entered judgment and levied on the goods. Replevin by the seller was sustained on the ground that the buyer had fraudulently concealed the existence of an undefended suit against him for more than he was worth. *Peckham, J.*, said: "There is good ground for inferring, from the facts proved, that the purchaser intended to commit a fraud in this purchase. Such a fraud may be as easily consummated by the suppression of a truth as by the suggestion of a falsehood." See *Armstrong v. Huffstutler*, 19 Ala. 51; *Marsh v. Webber*, 13 Minn. 109; *Turner v. Huggins*, 14 Ark. 21; *Stevens v. Orman*, 10 Fla. 9; *Hanson v. Edgerly*, 29 N. H. 343; *Brown v. Montgomery*, 20 N. Y. 237; *Pease v. McClelland*, 2 Bond 42.

Buyer can exact warranty if unwilling to deal on the general rule.

terms, he can protect himself against his own want of care or skill by requiring from the vendor a warranty of any matters, the risk of which he is unwilling to take on himself.⁸ But the use of any device by the vendor to induce

8. *Caveat Emptor*.—See *Veasey v. Daton*, 3 Allen 380, where Metcalf, J., said: "The plaintiff had no right to rely on the representation of value as a fact, nor to place any confidence in it. Such representation, however exaggerated, false and deceptive it may be, is not actionable if the subject of sale be open to the buyer's observation. He is bound to examine or inquire for himself and trust his own judgment, or take a warranty from the seller." See *Teague v. Irwin*, 127 Mass. 217; *Morrison v. Koch*, 32 Wis. 254; *McClanahan v. McKinley*, 52 Iowa 222. In *Beninger v. Corwin*, 24 N. J. L. 257, the suit was for the price of a horse, and the defence fraud in concealing that the horse was diseased. Ogden, J., said: "It cannot be concealed that K. got a great advantage in the trade and put off upon C. a defective, wind-broken horse, yet the question presses upon the court whether a legal defence was established. No warranty appears to have been made, and none can be inferred. * * * The doctrine seems to be firmly established that in cases of sales, if there be no warranty as to quality, or wilful misrepresentation, or artful device to disguise the character or conceal the defects of the thing sold, the vendee should be bound by the contract." See *Protection, &c., Co. v. Osgood*, 93 Ill. 69, 76; *Dillard v. Moore*, 7 Ark. 166; *Morris v. Thompson*, 85 Ill. 16; *Cogel v. Kniseley*, 89 Ill. 598. An extreme application of the maxim *caveat emptor* will be found in *Graffenstein v. Epstein*, 23 Kan. 443. The question was stated to be "whether a false and fraudulent representation as to the market price of a commodity made by a purchaser who knows, to a seller who does not know, the market price, to induce

a sale more advantageous to the purchaser than he could otherwise get, and which representation is believed and relied on by the seller to his damage, is such a fraudulent representation as avoids the contract of sale." Brewer, J., said: "The question thus presented must be answered in the negative. * * * The article was one of general commerce; there was no special relation of trust or confidence; no peculiar training was prerequisite to a knowledge of values; the market price was a matter of public knowledge and could be ascertained by any one by reasonable effort and inquiry. Under such circumstances, if one party chooses to take the statements of the other and act upon them, rather than make any inquiry as to the market price, he cannot thereafter repudiate his contract on account of the falsity of the statements." This case may be questioned. While the buyer was not bound to disclose the market price, he was bound, if he undertook to state it, to state it as he believed it to be. Thus it has been held in many cases that representations by the seller, that a patent, which was the subject of sale, had been largely sold and was profitable, if false, were fraudulent and would warrant avoidance of the contract. *Somers v. Richards*, 46 Vt. 170, 175; *Crosland v. Hall*, 33 N. J. Eq. 111. See cases cited in reporter's note to the latter case. *Kenner v. Harding*, 85 Ill. 264, 274; *Ives v. Carter*, 24 Conn. 392, 405, where false statements of offers for the property were held fraudulent. And see *Miller v. Barber*, 66 N. Y. 558, 567, where the property sold was stock, and the false statement was that certain persons named had made purchases of other stock of the company. This was held to be a material

the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself. ⁹

[In America, the doctrine that mere "dealer's talk" will not give rise to an action of deceit has been carried very far. Thus, ^{Law in America.} in *Ellis v. Andrews*, (g) a false statement by the vendor as to the value of stock was held to be a mere expression of opinion as to the value of the thing sold, and as such giving no right of action to the purchaser who bought on the faith of it.] ¹⁰

misstatement. A statement of the law which commends itself as reasonable and just will be found in *Jackson v. Collins*, 39 Mich. 557, 561. In that case a stock of goods in a store was sold. They were represented as fresh and new, but in fact were old. *Campbell, C. J.*, said: "It is certainly possible for the owner of a stock of goods to deceive a buyer who could, by examining each parcel by itself, avoid being deceived. All such transactions must be looked at reasonably. One who is as prudent on the particular occasion as most prudent men would be, and is nevertheless cheated, can hardly be held negligent." See *Savage v. Stevens*, 126 Mass. 207; *Smith v. Countryman*, 30 N. Y. 655, 670, 681. See *post* note 20.

9. *Artifices to Conceal. Aliud est Tacere, Aliud Celare.*—In *Matthews v. Bliss*, 22 Pick. 48, 52, *Shaw, C. J.*, said: "Each may act upon the knowledge which he has, without communicating it. But *aliud est tacere, aliud celare*. If there be studied efforts to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude." See *Roseman v. Cavan*, 43 Cal. 110, 118, where the language of the text is quoted and approved. *Smith v. Countryman*, 30 N. Y. 655, 681.

(g) 56 N. Y. 83; and see *Bishop v. Small*, 63 Me. 12.

10. *Expressions of Opinion are not Fraudulent.*—Where the representation

is upon its face a matter of opinion, and not of fact, it cannot be made the occasion of avoidance. In *Belcher v. Costello*, 122 Mass. 189, *Endicott, J.*, said: "The representation proved was, that the parties (who made the note given for the price) were good. This, taken by itself, is not the statement of a fact, but the expression of an opinion merely. The learned judge erred in ruling as matter of law that the representation that a party is in good pecuniary circumstances, and able to pay the notes, which is equivalent to a representation that he is good, is necessarily the representation of a fact." Whether a representation by a buyer asking credit as to his responsibility is a statement of fact or of opinion is often a question for the jury. In *Morse v. Shaw*, 124 Mass. 59, the buyer asking credit, and owning valuable real estate, made representations as to the amount of his debts. *Morton, J.*, said: "Such a representation may be intended as a willfully false statement of a fact, and may be understood as a statement of fact. Or it may be intended as the expression of the opinion or estimate which the owner has of the value of his property, and may be so understood. Suppose that a man who owns property worth \$1000, for the purpose of procuring credit represents that he has property worth \$100,000. It would be self-evident that he meant to misrepresent facts, and such misrepresentation would be fraud. But if the same man should represent that he had property worth \$1500, it might well

be regarded as an expression of his judgment or estimate of value, and therefore not an actionable fraud. In such cases it is for the jury to determine." See *Sledge v. Scott*, 56 Ala. 202, 206; *Bigler v. Flickinger*, 55 Penna. 279; *Homer v. Perkins*, 124 Mass. 431. In *Watts v. Cummins*, 59 Penna. 84, land sold in western Pennsylvania was said to be good oil land, but the court said that this was plainly an expression of opinion as to a matter unknown to both parties.

Statements of Value are not Fraudulent.—In *Homer v. Perkins*, 124 Mass. 431, *Endicott, J.*, said: "The mere affirmations or expressions of opinion by a seller in regard to the value of the property he is attempting to sell, or of a purchaser in regard to the value of the property he desires the seller to take in payment, can never be safely relied on by the other party. They are the common and well-understood affirmations in respect to property, as between buyer and seller, made for the purpose of increasing the price, and effecting a sale or barter, and in such a case the maxim *caveat emptor* applies. The party to whom they are made has no right to rely on them, and although false, and intended to deceive, the party who confides in them is not entitled to relief." This has been extended even to false representations as to the cost of the property. See *Medbury v. Watson*, 6 Metc. 246, 259, 260; *Veasey v. Daton*, 3 Allen 380; *Poland v. Brownell*, 131 Mass. 138; *State v. Phifer*, 65 N. C. 321, 326; *Long v. Woodman*, 58 Me. 49; *Holbrook v. Conner*, 60 Me. 578; *Cooper v. Lovering*, 106 Mass. 79; *Mooney v. Miller*, 102 Mass. 220; *Schramm v. O'Conner*, 98 Ill. 539; *Dawson v. Graham*, 48 Iowa 378; *First National Bank v. Yocum*, 11 Neb. 328; *Gordon v. Butler*, 105 U. S. 553; *Uhler v. Semple*, 20 N. J. Eq. 288; *Sledge v. Scott*, 56 Ala. 202; *Wilcox v. Henderson*, 64 Ala. 535, 541; *Samson v. Lord*, 13 How. 198; *Somers v. Richards*, 46 Vt. 170, 175; *Merwin v. Arbuckle*, 81

Ill. 501; *People v. Jacobs*, 35 Mich. 36; *Buschman v. Cold*, 52 Md. 202, 207; *Van Epps v. Harrison*, 5 Hill 63; *Kennedy v. Richardson*, 70 Ind. 524, 534; *Cagney v. Cuson*, 77 Ind. 494, 497; *Yeagin v. Irwin*, 127 Mass. 217; *Stevens v. Rainwater*, 4 Mo. App. 292; *Banta v. Savage*, 12 Nev. 151. And see *ante* note 8.

Misrepresentations as to Facts which throw Light on Value are Fraudulent.—Thus in *Manning v. Albee*, 11 Allen 520, the seller of goods took in payment bonds at a certain value on the credit of a false quotation in a newspaper shown to him by the buyer; and it was held that this was something more than an expression of opinion as to value; and *replevin* to recover the goods sold was sustained. *Smith v. Andrews*, 8 Ired. L. 6; *Pearce v. Blackwell*, 12 Ired. L. 49, 60. It is sometimes difficult to determine whether a statement is one of opinion or of fact. In *State v. Tomlin*, 29 N. J. L. 13, 23, defendant was indicted for obtaining property by false pretences, having bought a note at a low price by representing that the maker was insolvent. This was held a representation of a fact. *Ogden, J.*, said: "The status of the debtor is a fact, and he who unqualifiedly undertakes to declare what such status is, represents a fact, and does not express an opinion merely." *State v. Tomlin* was followed in the recent case of *State v. Hefner*, 84 N. C. 751, where there was a like indictment for falsely representing that a mare was sound, and there had never been anything the matter with her eyes. *Ashe, J.*, said: "If he had simply stated that the eyes of the mare were sound, this would have been no more than the expression of an opinion, which we think would not come within the statute; but when he says that there has never been anything the matter with them, this is a fact." In *Bradley v. Luce*, 99 Ill. 234, worthless stock was represented worth a large sum, and mortgages for \$12,000 on land worth \$2000, were

§ 642. The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided, for convenience, into three parts; 1st, fraud on the vendor; 2d, on the purchaser; 3d, on creditors, including the law on bills of sale. But it will be useful first to point out that a man may make himself liable in an *action, founded on tort* for fraud or deceit or [perhaps] negligence (*h*) in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence.

Action of deceit or tort may exist in favor of third persons, not parties to the contract.

[But the liability is limited in this way, that to enable a third person, a stranger to the contract, to maintain an action of deceit, it must appear that he has been injured by acting upon the defendant's false representation, made with the *direct* intent that he should act upon it in the manner which has occasioned the injury or loss. (*i*)

Limits of the liability.

§ 643. The principles by which the limits of responsibility for a false representation are to be ascertained, were laid down by Lord Hatherley (then Wood, V. C.) in *Barry v. Crosskey*, (*j*) as follows:

Lord Hatherley in *Barry v. Crosskey*.

"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting, is injured or damnified.

"Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified, *provided it appear that such false representation was made with the intent that it*

represented as good. These statements were held clearly fraudulent. In *Jackson v. Collins*, stated *ante* note 8, Campbell, C. J., said: "No rule can adequately define all the circumstances in which representations either of fact or of opinion may become fraudulent and actionable."

(*h*) *George v. Skivington*, L. R., 5 Ex. 1; but see *Heaven v. Pender*, 9 Q. B. D. 102, where *George v. Skivington* is disapproved, and the earlier case of *Winterbottom v. Wright*, 10 M. & W. 109, fol-

lowed in preference.

(*i*) *Langridge v. Levy*, 2 M. & W. 159; in error, 4 M. & W. 337, as explained and commented upon by Wood V. C., in *Barry v. Crosskey*, 2 J. & H. 117, 118, 123; and by Lord Cairns in *Peek v. Gurney*, L. R., 6 H. L. 377, 412; see, also, *Hosegood v. Bull*, 36 L. T. (N. S.) 617.

(*j*) 2 J. & H. at p. 122, adopted by Lord Cairns in *Peek v. Gurney*, L. R., 6 H. L., pp. 412, 413.

should be acted upon by such third person in the manner that occasions the injury or loss.

"Thirdly. The injury must be the *immediate* and not the remote consequence of the representation thus made. To render a man responsible for the consequence of a false representation made by him to another, upon which a third person acts, and so acts, is injured and damnified, it must appear that such false representation was made with the *direct* intent that it should be acted upon by such third person in the manner that occasions the injury or loss." 11

§ 644. The case usually cited as the leading one on this point is *Langridge v. Levy*. *Langridge v. Levy*, (*k*) where the defendant offered for sale a gun, on which he put a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty, George IV.: cost 60 guineas; only 25 guineas." The gun was sold to the plaintiff's father, who told the defendant that it was wanted "for the use of himself and his sons. It was warranted to be a good, safe, and secure gun, and to have been made by Nock." The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock's make. Parke, B., delivered the judgment of the court, after time taken for consideration. He said: "If the instrument in question * * * had been delivered by the defendant *to the plaintiff* for the purpose of being used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the

11. False Statements to a Third Person.—These principles are illustrated in *Eaton v. Avery*, 83 N. Y. 31, 34, where one of several partners made representations as to the pecuniary responsibility of his firm, to an agency whose business it was to ascertain and report the responsibility of merchants. On the faith of the report of this agency, goods were sold on credit to the firm, and the representations proving false, the seller brought suit against the partner who made them, for deceit. *Rapallo, J.*, said that it was a correct general proposition that a false

statement to one could not give a right of action to another to whom it was communicated. But if the statement is made for the purpose of being communicated to another and to influence his mind, such other, if he acts on such statement, may have a remedy. *Naugatuck Cutlery Co. v. Babcock*, 22 Hun 481, 485; *Commonwealth v. Call*, 21 Pick. 515; *Commonwealth v. Harley*, 7 Metc. 462. See *post* notes 12 and 13.

(*k*) 2 M. & W. 519; in error, 4 M. & W. 337.

leading one is that of *Pasley v. Freeman*; (l) which principle is that *a mere naked falsehood is not enough to give a right of action*: but if it be a falsehood told with the intention that it should be acted upon by the party injured, and that act must produce damage to him; if instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit.”

Pasley v. Freeman.

In the Exchequer Chamber the judgment was affirmed on the ground “that as there is fraud; and damage the result of that fraud; not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured.”

§ 645. In *George v. Skivington*, (m) the plaintiffs, Joseph George and Emma, his wife, claimed damages of the defendant, a chemist, for selling to the husband a bottle of a chemical compound to be used by the wife, as the defendant then knew, for washing her hair. The declaration charged negligence and unskillfulness of the defendant in making the said compound, and alleged personal injury to the wife resulting from the use of it. Demurrer and rejoinder. Held, a good cause of action on the authority of *Langridge v. Levy*. [This case, however, has met with disapproval, and is very doubtful law. (n)]

George v. Skivington.

But no action growing out of the contract can be maintained in such cases, except by parties or proxies. (o)

The distinction was clearly illustrated in a case in the Queen’s Bench, where there were two counts in the declaration; the first, on contract, which was held bad, the second, in tort, which was sustained. The fraud charged

But no such action can be maintained on contract.

Gerhard v. Bates.

(l) 3 T. R. 51, and 2 Sm. L. C. (ed. 1879) 66, where all the authorities are collected.

(m) L. R., 5 Ex. 1; 39 L. J., Ex. 8.

(n) See *Heaven v. Pender*, 9 Q. B. D. 102.

(o) *Winterbottom v. Wright*, 10 M. & W. 109; *Longmead v. Holiday*, 6 Ex. 761; *Howard v. Shepherd*, 9 C. B. 297

19 L. J., C. P. 249; *Playford v. United Kingdom Telegraph Co.*, L. R., 4 Q. B. 708.

was issuing to the public a false and fraudulent prospectus for a company, whereby the plaintiff was deceived into taking shares. (p)

This principle, that the liability in an action of tort may be enforced against a party guilty of fraudulent representations publicly given out and intended to deceive the public at large, by any person who has suffered damages in consequence of them, has since been frequently enforced by the courts. (q)

To entitle any one of the public to bring an action in tort for deceit, where fraudulent representations are published, he must establish a direct connection between himself and the person publishing them.

§ 646. [But it is now conclusively settled, overruling some of the earlier decisions, that this liability can only be enforced in cases where the person, who complains that he has been injured by acting in reliance upon the false representations, can establish in the communication of the false representations some direct connection between himself and the person publishing them.

This was decided by the House of Lords in *Peek v. Gurney*, (r) where it was held that the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, and concealing facts material to be known, does not, *as of course*, follow the shares on their transfer from an allottee to one who afterwards purchases them from him upon the market, the ground of the decision being, that as the object of the prospectus was to induce persons to become original shareholders in the company, its office was fulfilled when the shares were once allotted. (s) 12

Peek v. Gurney.

(p) *Gerhard v. Bates*, 2 E. & B. 476; 22 L. J., Q. B. 364. *ubi supra*; *Gerhard v. Bates*, *ante* § 645; *Langridge v. Levy*, and *Barry v. Crosskey*, *ante* § 643, were explained and adopted by Lord Chelmsford, at p. 396, and by Lord Cairns, at p. 412.

(q) *Scott v. Dixon*, reported in note, 29 L. J., Ex. 62; decided by the Q. B. in 1859; *Bagshaw v. Seymour*, in note, 29 L. J., Ex. 62, and 18 C. B. 903; *Bedford v. Bagshaw*, 4 H. & N. 538; 29 L. J., Ex. 59. But these last two cases are overruled by *Peek v. Gurney*, *infra*. See, also, *North Brunswick Railway Co. v. Conybeare*, 9 H. L. C. 712; *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 145; *Henderson v. Lacon*, 5 Eq. 249 (V. C. W.)

(r) L. R., 6 H. L. 377.

(s) In this case, *Seymour v. Bagshaw*, and *Bedford v. Bagshaw*, *ubi supra*, were expressly overruled; and *Scott v. Dixon*, *ubi supra*; *Gerhard v. Bates*, *ante* § 645; *Langridge v. Levy*, and *Barry v. Crosskey*, *ante* § 643, were explained and adopted by Lord Chelmsford, at p. 396, and by Lord Cairns, at p. 412.

12. False Representations by Directors.—*Peek v. Gurney* was cited in *Bank of Montreal v. Thayer*, 7 Fed. Reporter 622, 628, and *McCrary, J.*, said: "We have seen no case which holds that it must be made to appear that the fraudulent representations were made directly and individually to the plaintiff. It is enough if he was authorized to act upon them, and did so." In America the liability of directors for fraudulent representations in issuing shares, and for

§ 647. The following action was held to be maintainable in the State of New York. A had agreed to bring certain animals for sale and delivery to B, at a specified place. A third person, desirous of making a sale to B, falsely represented to him that A had abandoned all intention of fulfilling his contract, thereby inducing B to supply himself by buying from that third person. A was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A, it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A and B was one that could not have been enforced. (t) 13

Case decided in New York in action for deceit.

We will now revert to the subject of fraud as specially applied in cases of sale.

issuing void shares, is carried further than in *Peek v. Gurney*; and the officers issuing such shares are held liable not only to the first purchasers but to any *bona fide* holder for value. In *Bruff v. Mali*, 36 N. Y. 200, 206, officers of a company made fraudulent and void issues of stock, and they were held liable to any *bona fide* purchaser of the stock. The court likened the case to that of *Thomas v. Winchester*, 7 N. Y. 397, where a poison was carelessly labeled as a harmless medicine, and after it had passed through several hands, caused mischief, for which the original vendor was held liable directly to the injured party. See *ante* § 645; *Fenn v. Curtis*, 23 Hun 384; *Barnes v. Brown*, 80 N. Y. 527. So, too, in *Bartholomew v. Bentley*, 15 Ohio 659, the managers of a bank issued bills without authority of law. One who took some of the bills for value brought suit against the bank for fraud. The court said: "If there was a general design to defraud all such as could be defrauded by taking their paper issues, it is sufficient, and the plaintiff may maintain his suit, provided he has taken the paper and suffers from the fraud." But in *Wakeman v. Dalley*, 51 N. Y. 27, it was held that a director of a corporation could not be held liable for fraud

because of false statements in a published report of the condition of the company, unless it is shown that the falsity of the statements was known to him. *Arthur v. Griswold*, 55 N. Y. 400; *Morgan v. Skiddy*, 62 N. Y. 319; *Thompson on Liability of Officers of Corporations*, p. 401, *et seq.*

(t) *Benton v. Pratt*, 2 Wend. 385. See notice of this case by Colt, J., in *Randall v. Hazleton*, 94 Mass. 412, at p. 417.

13. The case of *Benton v. Pratt*, 2 Wend. 385, mentioned in the text, was followed in *Rice v. Manley*, 66 N. Y. 82. In that case a contract was made to sell cheese. It was void because within the statute of frauds, but both parties would have performed it but for the fraud. The defendant, to prevent the sale and to procure a sale to himself, sent to the seller a telegram signed with a name resembling that of the buyers, to the effect that they did not care for the cheese. Deceived by this, the owner sold and delivered his cheese to the person who had sent the telegram. The first buyers sued the second for fraud. Earl, J., said: "What difference can it make that plaintiffs could not enforce their agreement? The referee found that S. (the seller) would have performed the agreement and plaintiffs would have had

SECTION II.—FRAUD ON THE VENDOR.

§ 648. It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The recent cases of *Stevenson v. Newnham*, (u) in the Exchequer Chamber, and of *Pease v. Gloaghec*, (v) in the Privy Council, confirming the principles asserted by the Exchequer in *Kingsford v. Merry*, (x) taken in connection with the decision of the House of Lords in *Oakes v. Turquand*, (y) leave no room for further question. By the rules established in these cases, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud, or a mere delivery of the goods into his possession, induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes: but not in the latter case.

Effect of fraud on the vendor in passing property.

Depends on vendor's intention to transfer possession and ownership, or possession only.

§ 649. In the former case the contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in *assumpsit* for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it.¹⁴ But in the meantime, and until he elects, if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those

Contract not void *ab initio*, but voidable.

Rights of bona fide third persons protected, if acquired before avoidance.

the benefit of it, but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged, that there was not both fraud and damage?" See *Snow v. Judson*, 38 Barb. 210; *White v. Merritt*, 7 N. Y. 352.

(u) 13 C. B. 285, and 22 L. J., C. P. 10.

(v) L. R., 1 P. C. 220; 3 Moo. P. C. (N. S.) 556.

(x) 11 Ex. 577, and 25 L. J., Ex. 166.

(y) L. R., 2 H. L. 325. See, also, *Reese River Mining Co. v. Smith*, 2 Ch. 604,

and L. R., 4 H. L. 64; and *Clough v. London and North Western Railway Co.*, L. R., 7 Ex. 26, *post* § 659.

14. The Defrauded Party Only can Rescind.—As the contract is valid at the election of the defrauded vendor, it follows that no one else can treat it as void if he does not. Thus in *Brown v. Pierce*, 97 Mass. 46, a defrauded vendor resold the property without taking steps to rescind the first sale, and it was held that the second buyer could not claim an

of such innocent third person. (z) ¹⁵ If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the possession of the goods, there is no sale, and

Not protected
where vendor
only trans-

avoidance of the former sale, nor hold the property against the dishonest buyer. See, also, *Henry v. Daley*, 17 Hun 210; *Rowley v. Bigelow*, 12 Pick. 307, 312.

The Rescission Must be Complete.

—If the seller rescinds, he must rescind entirely. He cannot treat part of the contract as valid and rescind the rest. If he has given credit for the price, he cannot rescind the credit and sue at once for the price; he should rescind the whole and sue in trover or replevin. *Ryan v. Brandt*, 42 Ill. 78; *Moriarty v. Stofferan*, 89 Ill. 528; *Stewart v. Emerson*, 52 N. H. 301, 321; *Weed v. Page*, 7 Wis. 503. Thus in *Kellogg v. Turpie*, 93 Ill. 265, the vendor, who had sold on credit, finding that he had been deceived by the buyer, brought suit, before the credit expired, for the price. But the court said that the buyer could not rescind the credit and sue on the contract. If he desired to rescind, he must bring trover or replevin for the goods. To the same effect see *Adler v. Fenton*, 24 How. 407. In New York, however, it was held that in such a case the seller might rescind the sale and then waive the tort and sue *ex contractu* on an implied sale. *Both v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 3 Keyes 120. See, also, *McGoldrick v. Willetts*, 52 N. Y. 612, 620. But this right to waive the tort and sue in *assumpsit* is, by the weight of authority, limited to cases where the wrongful possessor of property has sold it, in which an action may be brought for money had and received. See *Kellogg v. Turpie*, *supra*, and cases cited.

Restoration Necessary to Avoidance.—See *ante* § 606, note 2. A defrauded seller does not lose the right to rescind because the buyer has incurred expenses with respect to the property in carrying out the fraud, nor is it necessary that the seller should make good such ex-

penses, even though he receives an advantage from them by rescission. Thus in *Guckenheimer v. Angevine*, 81 N. Y. 394, the buyer, who obtained the property by fraud, paid a revenue tax in order to obtain possession, and it was held that the seller might rescind the sale without tendering back the tax, although he received the advantage of the payment. See *Downer v. Smith*, 32 Vt. 1; *Grant v. Law*, 29 Wis. 99. And where the defrauded seller is able to recover only a portion of the property, he may maintain a suit for the value of the residue. *Powers v. Benedict*, 88 N. Y. 605; *Kinney v. Kiernan*, 49 N. Y. 164. In the recent case of *Dayton v. Morton*, 47 Mich. 193, 195, on a suit in conversion to recover the value of a horse, for the price of which a note had been given, which note the seller did not surrender, *Campbell, J.*, said: "We do not understand that there is any rule requiring a defrauded party to give up the personal unsecured obligation of those who defraud him as a condition of a suit for the fraud. It is one of the documents which may be necessary, as it was here, to prove the false representations which were endorsed on the note itself. By surrendering this, plaintiff would have lost the most important item of proof he possessed." But see *Auger v. Thompson*, 3 Ont. App. 19.

(z) *Attenborough v. London and St Katherine's Dock Co.*, 3 C. P. D. 450, C. A.; *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 184, C. A.

15. Bona Fide Purchasers Protected.—A *bona fide* purchaser for valuable consideration, without notice of fraud, from one who has fraudulently obtained both possession and property, will be protected.

Maine.—*Ditson v. Randal*, 33 Me. 202; *Titcomb v. Wood*, 38 Me. 561; *Lee v.*

Kimball, 45 Me. 172, (criticised, 58 N. Y. 77.)

New Hampshire.—Kingsbury v. Smith, 13 N. H. 109.

Massachusetts.—Rowley v. Bigelow, 12 Pick. 307, 312; Hoffman v. Noble, 6 Metc. 68; Easter v. Allen, 8 Allen 7.

Connecticut.—Williamson v. Russell, 39 Conn. 406, 412; Lynch v. Beecher, 38 Conn. 490.

New York.—Fassett v. Smith, 23 N. Y. 252; Stevens v. Brennan, 79 N. Y. 254; Paddon v. Taylor, 44 N. Y. 371.

Pennsylvania.—Sinclair v. Healy, 40 Penna. 417.

Delaware.—Mears v. Waples, 3 Houst. 581, 620; affirmed, 4 Houst. 62, (following Hall v. Hinks, 21 Md. 406, 418.)

Maryland.—Powell v. Bradlee, 9 Gill & J. 220, 278; Hall v. Hinks, 21 Md. 406, 418. This case has been often cited, and dissents from the leading Massachusetts case of Cogill v. Hartford & N. H. R. R., 3 Gray 545.

Virginia.—Williams v. Givin, 6 Gratt. 268; Wickham v. Martin, 13 Gratt. 427; Old Dominion Steamship Co. v. Burckhardt, 31 Gratt. 664, 678, (approves Hall v. Hinks, 21 Md. 406.)

Georgia.—Kern v. Thurber, 57 Ga. 172; Nicol v. Crittenden, 55 Ga. 497.

Mississippi.—Lee v. Portwood, 41 Miss. 109.

Ohio.—Dean v. Yates, 23 Ohio St. 388, 395; Combes v. Chandler, 33 Ohio St. 178.

Indiana.—Bell v. Cafferty, 21 Ind. 411; Sharp v. Jones, 18 Ind. 314; Claflin v. Cottman, 77 Ind. 58.

Illinois.—Chicago Dock Co. v. Foster, 48 Ill. 507; Brundage v. Camp, 21 Ill. 330; Ohio & M. R. R. v. Kerr, 49 Ill. 458; Holland v. Swain, 94 Ill. 154; Van Duzer v. Allen, 90 Ill. 499.

Kentucky.—Arnett v. Cloudas, 4 Dana 299; Wood v. Yeatman, 15 B. Mon. 270.

Tennessee.—Arendale v. Morgan, 5 Sneed 703; Hawkins v. Davis, 5 Baxt. 698; Gage v. Epperson, 2 Head 669; Hawkins v. Davis, 8 Baxt. 506.

Wisconsin.—Singer Co. v. Sammia, 49 Wis. 316.

Minnesota.—Cochran v. Stewart, 21 Minn. 435.

Missouri.—Wineland v. Coonce, 5 Mo. 296.

Kansas.—Wilson v. Fuller, 9 Kan. 176.

California.—Paige v. O'Neal, 12 Cal. 483, 497; Sargent v. Sturm, 23 Cal. 359.

In order to fully protect a *bona fide* purchaser, the rule is established that he may sell and give good title to one who has notice of the fraud; otherwise he might be deprived of power to sell. What can rightfully be sold may as rightfully be bought. 2 White & T. Lead. Cas. in Eq. 95.

Who are Bona Fide Purchasers.—One who takes property in payment of an existing debt is not protected as a *bona fide* purchaser for value. In Barnard v. Campbell, 58 N. Y. 73, 76, Allen, J., said that an innocent purchaser from the vendee could not defend against the claim of the defrauded vendor, unless such purchaser had "parted with value upon the faith of the apparent title of the wrongdoer and his right to dispose of the property." In that case the purchasers had ordered 1800 bags of linseed from one J., and sent notes for the price, at the same time that they sent the order. J. bought the linseed to fill the order by means of fraudulent representations, and sent it to his purchasers whose notes he had discounted. The defrauded vendor brought replevin against the innocent purchasers, and recovered, because they "parted with their notes upon the faith of the promise of J. alone." They did nothing based upon his title and possession. See same case, 55 N. Y. 456, and see the similar case of Fletcher v. Drath, 66 Mo. 126; Weaver v. Barden, 49 N. Y. 286; Stevens v. Brennan, 79 N. Y. 254, 258; Poor v. Woodburn, 25 Vt. 235; Sargent v. Sturm, 23 Cal. 359; Hyde v. Ellery, 15 Md. 496, 501; Pope v. Pope, 40 Miss.

he who obtains such *possession* by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner. 16

§ 650. To these common law rules, there is one statutory exception. Where the fraud by which the goods are obtained from vendor, is such as to enable him to succeed in prosecuting to conviction the fraudulent buyer as having been guilty

ferred possession.

Exception, where true owner prosecutes to conviction.

516; But see, *contra*, *Shufeldt v. Pease*, 16 Wis. 659. An attaching creditor of the purchaser is not in the position of a *bona fide* purchaser. *Thompson v. Rose*, 16 Conn. 71; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun 481, 485; *Buffington v. Gerrish*, 15 Mass. 156; *Wiggin v. Day*, 9 Gray 97; *Atwood v. Dearborn*, 1 Allen 483; *Whitman v. Merrill*, 125 Mass. 127; *American, &c., Express Co. v. Willsie*, 79 Ill. 92; *Jordan v. Parker*, 56 Me. 557; *Field v. Stearns*, 42 Vt. 106; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Poor v. Woodburn*, 25 Vt. 234; *Hackett v. Callender*, 32 Vt. 97. See, however, *Gilbert v. Hudson*, 4 Me. 345. And a creditor who buys in the property at a sale under his execution against a fraudulent purchaser, cannot hold the property so bought against the defrauded vendor. The court will strike out the amount realized on the execution if the defrauded seller retakes the property. *Devoe v. Brandt*, 53 N. Y. 462, 466. One who has given notes for the price is not a *bona fide* purchaser for value until he makes payment on the notes. *Matson v. Melchor*, 42 Mich. 477. One who buys with notice of the fraud of his vendor in obtaining the property is not a *bona fide* purchaser, and is liable not only to lose the goods, but if he sells them is liable for their value. *Meacham v. Colliquan*, 7 Daly 402; *Rateau v. Bernard*, 3 Blatchf. 244; *Stearns v. Gage*, 79 N. Y. 102. And where a *bona fide* purchaser from a fraudulent purchaser, learned of the fraud before the whole price was paid, he was protected against the defrauded vendor only to the extent of the amount paid before notice of the

fraud, and not as to subsequent payments. *Dows v. Kidder*, 84 N. Y. 121. An assignee in bankruptcy is not in the position of a purchaser for value, and therefore the sale may be avoided as against him by a seller defrauded by the bankrupt. *Donaldson v. Farwell*, 93 U. S. 631; *Montgomery v. Bucyrus Machine Works*, 92 U. S. 257. The same principle applies to the case of an assignee for the benefit of creditors. Such assignee is not a purchaser. *Belding v. Frankland*, 8 Lea 67, 72; *Ratcliffe v. Sangston*, 18 Md. 383; *Bussing v. Rice*, 2 Cush. 48.

16. Possession Without Title Gives no Authority to Sell.— See *ante* Book I., Chap. II., Section I., and see *ante* § 437, *et seq.* *Western Trans. Co. v. Marshall*, 4 Abb. App. Dec. 575; *Kinsey v. Leggett*, 71 N. Y. 387; *Decan v. Shipper*, 35 Penna. 239; *Brower v. Peabody*, 13 N. Y. 14; *Dows v. Perrin*, 16 N. Y. 325; *Dows v. Greene*, 24 N. Y. 638; *Dean v. Yates*, 23 Ohio St. 388, 396. Where the buyer personates another, or falsely pretends to be agent for another, and thereby obtains possession of property, no title passes to him; neither can he give title by a sale to the person whom he represented without authority. True, the intent of the seller was to confer title, but not on the person dealt with, as agent, and no title which comes through him can be sustained. See *ante* § 608, note 3, *post* § 663. In such case the person falsely represented, if the goods come to his hands, may adopt the transaction as his own, thus ratifying the agency; but if he does so he must adopt it wholly. *Dalton v. Hamilton*, 1 Hannay (N. B.) 422, stated *post* § 660, note 19.

tion a person
guilty of false
pretences.

of obtaining the goods by false and fraudulent pretences, he will be entitled, after such conviction, to recover his goods, even from a third person, who is a *bona fide* purchaser from the party committing the fraud. The statute and cases under it have already been reviewed, *ante* Book I., Part I., Chap. II.

[It has, however, been recently decided that the statute has no application to a case of false pretences where the property in the goods has passed. (*Vide* *Lindsay v. Cundy*, 1 Q. B. D. 348; and *Moyce v. Newington*, 4 Q. B. D. 32, *ante* § 12.)] 17

Alteration in
law.

§ 651. The early cases are not universally in accord with the principles above stated, and in more than one of them the property was held not to have passed, although it was very plainly the intention of the vendor to transfer the title, as well as the possession, of the goods.

Earlier cases
reviewed.

In *Martin v. Pewtress*, (a) decided in 1769; *Read v. Hutchinson*, (b) in 1813; *Gladstone v. Hadwen*, (c) in the same year; *Noble v. Adams*, (d) in 1816; and the *Earl of Bristol v. Wilsmore*, (e) in 1835, *dicta* are to be found as to the effect of fraud in preventing the property from passing to the purchaser, which are quite in opposition to the later authorities, though in most, if not all, of these cases the decisions were quite correct.

The last-mentioned case was one in which a check had been given by the buyer on a bank in which he had no funds, and was decided on the authority of *Read v. Hutchinson*, *Noble v. Adams*, *supra*; and of *Rex v. Jackson*, (f) in which a conviction for obtaining goods under false pretences (under the 30th Geo. II., c. 24) was upheld on proof that the accused had obtained the goods by giving in payment a check on a banker with whom he had no cash, and which he knew would not be paid.

Duff v. Budd (g) was an action by a vendor against a common carrier to whom he had delivered goods, to be forwarded to Mr. James Parker, High street, Oxford. The goods had

17. See discussion of the subject in *Cochran v. Stewart*, 21 Minn. 435, 440, *Gilfillan, C. J.*, concluding that the rights of a *bona fide* purchaser are the same whether the fraud is a felony or not. But in *Fassett v. Smith*, 23 N. Y. 252, it is assumed that no title can pass where the seller acquired title by a fraud amounting to felony.

(a) 4 Burr. 2478.

(b) 3 Camp. 352.

(c) 1 M. & S. 517.

(d) 7 Taunt. 59.

(e) 1 B. & C. 514; and see *Loughnan v. Barry*, 6 Ir. R. C. L. 457.

(f) 3 Brod. & B. 116.

(g) 3 B. & B. 177.

been ordered by an unknown person, and there was no *James Parker* in that street, but there was a *William Parker*, a solvent tradesman, who refused the parcel. Soon after, a person came to the defendant's office and claimed the parcel as his own, and on paying the carriage it was delivered to him. He had on previous occasions received goods from the same office, directed to Mr. Parker, Oxford, to be left till called for. One of the grounds of defence taken by Pell, Serjeant, was that the property in the goods had passed out of the plaintiff to the consignee. Dallas, C. J., and Burrough, J., did not notice the point, but Park, J., said that the ground taken did "not apply to a case bottomed in fraud in which there had been no sale," and Richardson, J., said, "there was clearly a property in the plaintiffs entitling them to sue, as they had been imposed on by a gross fraud."

§ 652. A few years later, a case almost indetical in its features came before the same court. *Stephenson v. Hart* (*h*) was, ^{*Stephenson v. Hart.*} again, an action by a vendor against a common carrier. A purchaser bought goods from the plaintiff, and ordered them to be sent to J. West, 27 Great Winchester street, London, and gave a spurious bill of exchange in payment. The vendor delivered the goods to the carrier to be forwarded to the above address. No person was found at the address, but a few days after the carrier received a letter signed "J. West," stating that a box had been addressed to him by mistake to Great Winchester street, and asking that it should be forwarded to him at the Pea Hen, a public house at St. Alban's. The box was so forwarded, and the person who had sent for it, said it was for him, and stated its contents before opening it, thus showing that *the box had reached the person to whom it was addressed*. One ground of defence, again, was that upon the delivery to the carriers the property ceased to be in the vendor, and was vested in the consignee. Park, J., held that the property had not passed, because West had never meant to pay for the goods, and the true question was "not what the *seller* meant to do, but what are the intentions of the *customer*. Did he mean to buy?" Burrough, J., said that the property had never passed out of the consignor, giving no reason except that the transaction of West was a gross fraud; but Gaselee, J., doubted strongly whether trover could lie when the carrier had delivered the goods to the person to whom they had been really consigned by the vendor.

§ 653. It is submitted that both these cases against the carriers are very doubtful authorities under the modern doctrine, which clearly holds that the property does pass, when the *vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention. (i)

Doubt submitted as to these two cases.

In *Heugh v. The London and North Western Railway Company*, (k) where the same question was involved under very similar circumstances, it was held that it was a question of fact for the jury whether the carrier had acted with reasonable care and caution with respect to the goods after their refusal at the consignee's address, and the court refused to set aside a verdict for the defendant on that issue.

Heugh v. London and North Western Railway Co.

In *McKean v. McIvor*, (l) the decision was also in favor of the carriers, and Bramwell, B., expressed concurrence in the opinion of Gaselee, J., who dissented in *Stephenson v. Hurt*, (m) *supra*.

McKean v. McIvor.

§ 654. In *Irving v. Motley*, (n) the facts were, that one Dunn and a firm of Wallington & Co., had been engaged in a series of transactions, in which Dunn, as agent, purchased for them goods, on credit, and immediately resold them at a loss, the purpose being to raise money for the business of Wallington & Co. Dunn was also an agent for the defendant Motley, who was entirely innocent of any knowledge of, or participation in, the transactions of Wallington & Co. Under these circumstances, Dunn, in behalf of Wallington & Co., applied to the defendant for an advance, which the latter agreed to make if secured by a consignment of goods. Thereupon Dunn, as agent of Wallington & Co., bought a parcel of wool from the plaintiff, on credit, and at once transferred it to Motley, as security for the advance. Wallington & Co. became bankrupt a few days after this transaction, and the plaintiff brought trover against Motley for the wool. A verdict was given for the plaintiff, the jury finding that the transaction was fraudulent, and that Motley knew nothing of the fraud, but that Dunn was his agent as well as that of Wallington &

Irving v. Motley.

(i) This expression of doubt is not withdrawn in the third edition of this treatise. It seems to be further justified by the three cases since decided in the Exchequer, in all of which the defence of the carriers was successful, though the only one in which the point here sug-

gested was taken into consideration was *Clough v. London and North Western Railway Co.*, L. R., 7 Ex. 26, *post* § 650.

(k) L. R., 5 Ex. 51.

(l) L. R., 6 Ex. 36.

(m) 4 Bing. 676.

(n) 7 Bing. 543.

Co. The court refused to set aside the verdict, but the judges were not in accord as to the grounds. Tindal, C. J., said: "The ground set up here is that there was an *acting and an appearance of purchase* given to the transfer of these goods, which in truth and justice it did not really possess. Whether Dunn, as the agent of Wallington & Co., went into the market and got these goods into his possession, under such representation as may amount to obtaining goods under false pretences, it is not necessary to say, but it comes very near the case: it is under circumstances that place him and Messrs. Wallington in the light of conspirators to obtain possession of the goods. * * * At all events, it was left to a jury of merchants, and though they have acquitted the defendants of fraud, yet they involved them in the legal consequences, as it was a fraud *committed by their agent with a view to benefit them.*" Park, J., agreed with the Chief Justice, but he expressed anxiety to explain *Noble v. Adams*, (o) saying, that the court did not hold, nor mean to hold in that case, that obtaining goods under false pretences was the *only* ground upon which the transaction could be held void. Gaselee, J., was careful to confine the doctrine of the case before the court, to the special circumstances, saying: that it was "maintainable against the defendants, because they had constituted Dunn their agent, for the purpose of securing themselves, by getting a consignment of wool made to them from Wallington & Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the defendants may have acted, they cannot take any benefit from the misconduct of that agent." Alderson, J., however, thought that the case was confused by treating it as one of principal and agent; that Dunn and Wallington were principals in a conspiracy to get the goods from the plaintiff, and therefore *no property passed out of Messrs. Irving.*

§ 655. In *Ferguson v. Carrington*, (p) goods were sold to defendant on credit, whereupon he immediately resold them at lower prices, and the vendor brought *assumpsit* for the price before the maturity of the credit, on the ground that the defendant had manifestly purchased with the preconceived design of not paying for them. Lord Tenterden, C. J., nonsuited the plaintiff, on the ground that by bringing an action on the contract, he affirmed it, and was therefore bound to wait till the end of the credit, but that "if the defendant had obtained the goods with the *preconceived design of not pay-*

*Ferguson v.
Carrington.*

(o) 7 Taunt. 59.

(p) 9 B. & C. 59.

ing for them, no property passed to him by the contract of sale, and it was competent to the plaintiff to bring trover, and treat the contract as a nullity, and the defendant not as a purchaser of the goods, but as a person who had obtained tortious possession of them." Park, J., concurred in this view.

It should not be overlooked that in this, as in several of the preceding cases, the action was between the true owner and the fraudulent buyer; that the language of the judges was intended to apply only to the case before them, and was not therefore so guarded in relation to the effect of the contract in transferring the property, as it would doubtless have been if the rights of innocent third parties had been in question.

§ 656. In *Load v. Green*, (q) the buyer purchased the goods on the 1st of July, they were delivered on the 4th, and a fiat in bankruptcy issued on the 8th. It was uncertain whether the act of bankruptcy had been committed prior to the purchase. The jury found that the buyer purchased with the fraudulent intention of not paying for the goods; and it was held, that even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt.

[In *Ex parte Whittaker*, (r) the buyer had committed an act of bankruptcy on the 1st of December, and on the 3d a bankruptcy petition had been filed. On the 5th of December the buyer purchased wool at an auction, and the vendor being unaware of his pecuniary circumstances, allowed him to remove it without paying the price. The buyer made no representation at the time as to payment. Held, on these facts that it was not clear that the buyer purchased with the intention of not paying for the goods, and that the vendor therefore was not entitled to have the contract rescinded.] 18

(q) 15 M. & W. 216.

(r) 10 Ch. 446.

18. Purchase with Intent not to Pay.—In Pennsylvania it is held that a purchase on credit by one who knows he is insolvent, is not fraudulent. In that state it is held that to avoid a sale for fraud there must be "artifice, intended and fitted to deceive." The case usually cited is *Smith v. Smith*, 21 Penna. 367.

Lowrie, J., said: "The instruction is, that an intention not to pay, and conscious and unrevealed insolvency, make a purchase fraudulent, legally as well as morally. Is it so? An intention not to pay is dishonest, but it is not fraudulent. The law provides an action on the contract as the remedy for just such dishonesty. And it is no more fraudulent to have such an intention at the time of the purchase than

§ 657. In the early case of *Parker v. Patrick*, (s) the King's Bench held, in 1793, that where goods had been obtained on false pretences, and *the guilty party had been convicted*, the title

Parker v. Patrick.

at the time when payment ought to be made. * * Where must we look for fraud? Not in the buyer's intention merely. It must be fraud on the vendor, that is, fraud acted out. * * The dishonest intention and the concealed insolvency did not induce the vendor to sell his goods." This was followed in *Backenoss v. Speicher*, 31 Penna. 324; in *Harner v. Fisher*, 58 Penna. 453; and in *Rodman v. Thalheimer*, 75 Penna. 232. In the last case the court says "Insolvency and a knowledge of it at the time of the sale are evidence to go to the jury with other facts to show the intended fraud, but standing alone will not operate to rescind." See *Kline v. Baker*, 99 Mass. 253, where a Pennsylvania sale was in question. The Pennsylvania rule was approved in *Bell v. Ellis*, 33 Cal. 620; and there is a *dictum* to the same effect in *Wilson v. White*, 80 N. C. 280; but it seems to have found very little support elsewhere.

A Purchase by one who does not Intend to Pay, may be Avoided as Fraudulent.—This is the principle established by the recent decisions in most of the states; and in the United States Supreme Court, in *Donaldson v. Farwell*, 93 U. S. 631, it was adopted and declared to be the doctrine established by a preponderance of authority. *Wiggin v. Day*, 9 Gray 97; *Dow v. Sanborn*, 3 Allen 181; *Thompson v. Rose*, 16 Conn. 71, 81; *Ayres v. French*, 41 Conn. 142, 153, 155; *Burrill v. Stevens*, 73 Me. 395; *Stewart v. Emerson*, 52 N. H. 301, 318; *Mulliken v. Millar*, 12 B. I. 296; *Powell v. Bradley*, 9 Gill & J. 220, 248, 278; *Peters v. Hilles*, 48 Md. 506, 512; *Bidault v. Wales*, 19 Mo. 36; 20 Mo. 546; *Fox v. Webster*, 46 Mo. 181; *Byrd v. Hall*, 2 Keyes 646; *Johnson v. Monell*, 2 Keyes 655; *Henne-*

quin v. Naylor, 24 N. Y. 139; *Devoe v. Brandt*, 53 N. Y. 462; *Schufeldt v. Schnitzler*, 21 Hun 462; *Wright v. Brown*, 67 N. Y. 1; *Stoutenburgh v. Konkle*, 15 N. J. Eq. 33; *Mears v. Waples*, 3 Houst. 581; *Doyle v. Mizner*, 40 Mich. 160; *Shipman v. Seymour*, 40 Mich. 274, 283; *Talcott v. Henderson*, 31 Ohio St. 162; *Allen v. Hartfield*, 76 Ill. 358; *Lane v. Robinson*, 18 B. Mon. 623; *Belding v. Frankland*, 8 Lea 67; *Kloppen-stein v. Mulcahy*, 4 Nev. 296; *Seligman v. Kalkman*, 8 Cal. 207, (criticised in last case and in *Bell v. Ellis*, 33 Cal. 620); *Parker v. Byrnes*, 1 Low. 539, 542; *Davis v. Stewart*, 8 Fed. Reporter 803; *Davis v. McWhirter*, 40 U. C. Q. B. 598. But failure to disclose insolvency is not alone enough to establish intent not to pay; it is evidence of such intent, but not conclusive. *Schufeldt v. Schnitzler*, 21 Hun 462; *Nichols v. Pinner*, 18 N. Y. 295; *Wright v. Brown*, 67 N. Y. 4; *Redington v. Roberts*, 25 Vt. 686; *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384; *Burrill v. Stevens*, 73 Me. 395; *Kloppen-stein v. Mulcahy*, 4 Nev. 296; *Talcott v. Henderson*, 31 Ohio St. 162; *Belding v. Frankland*, 8 Lea 67.

The intent not to pay for property bought on credit may be proved by evidence of other fraudulent purchases, part of the same scheme of fraud, by the secreting of the property bought as soon as obtained, or by turning it over to another creditor, or by evidence of admissions, or of subsequent conduct indicating a design to defraud, or by other circumstances. *Wiggin v. Day*, 9 Gray 97; *Parker v. Byrnes*, 1 Low. 539, 542; *Jordan v. Osgood*, 109 Mass. 462; *Davis v. McWhirter*, 40 U. C. Q. B. 598; 2 Kent Com. 484.

(s) 5 T. R. 175.

of the original owner could not prevail against the rights of a pawn-broker, who had made *bona fide* advances on them to the fraudulent possessor. This case has been much questioned, but the

Remarks on it. only difficulty in it may be overcome by adopting the suggestion made by Parke, B., in *Load v. Green*, namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the judges made remarks on the case, in *White v. Garden*, (t) and it was cited by the court as one of the acknowledged authorities on this subject in *Stevenson v. Newnham*. (u)

In *Powell v. Hoyland*, (v) decided in 1851, Parke, B., expressed a strong impression that trespass would not lie for goods obtained by fraud, "because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

Powell v. Hoyland. In *White v. Garden*, (x) the innocent purchaser from a fraudulent vendee was protected against the vendor, and all the judges expressed approval of the opinion given by Parke, B., in *Load v. Green*.

White v. Garden. In *Stevenson v. Newnham*, (y) in 1853, Parke, B., again gave the unanimous opinion of the Exchequer Chamber, that the effect of fraud "is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind*. In the first instance, *the property passes* in the subject matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it though it is *voidable* between the original parties."

§ 658. This decision was not impugned, when the Exchequer Chamber, in *Kingsford v. Merry*, (z) in 1856, held that the defendant, an innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods to himself by falsely representing that a sale had been made to him by the owner's agents, the

(t) 20 L. J., C. P. 167, and 10 C. B. 919. (z) 20 L. J., C. P. 167, and 10 C. B. 919.
 (u) 13 C. B. 285, and 22 L. J., C. P. 110; and see *Moyce v. Newington*, 4 Q. B. D. 35, ante § 12. (y) 13 C. B. 285, and 22 L. J., C. P. 110.
 (v) 6 Ex. 67-72. (s) 1 H. & N. 503; 26 L. J., Ex. 83.

court saying on these facts that the parties "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." This decision reversed the judgment of the Exchequer of Pleas, (a) but it was explained by Bramwell, B., in *Higgins v. Burton*, *infra*, and by Lord Chelmsford, in *Pease v. Gloahec*, *infra*, that this was only by reason of a changed state of facts, and that the principles on which both courts proceeded were really the same.

§ 659. In *Clough v. The London and North Western Railway Company*, (b) the Exchequer Chamber gave an important decision upon several questions involved in the subject now under examination. The decision was prepared by Blackburn, J., though delivered by Mellor, J. (c) The facts were that the London Pianoforte Company sold certain goods to one Adams, on the 18th of May, 1866, for which he paid £68 in cash, and gave his acceptance at four months for £135 8s., the whole residue of the price. He directed the vendors to forward the goods by the defendants' railway to the address of the plaintiff at Liverpool, whom he represented to be his shipping agent. On the arrival of the goods in Liverpool the defendants could not find Clough at the address given by Adams, and in a letter to the vendors, the pianoforte company, the defendants stated this fact, and asked for instructions. Almost at the same time the vendors learned that Adams was a bankrupt, and at 9:30 A. M., on the 22d of May, they sent notice to the defendants in London, to stop the goods *in transitu*; but before this notice reached Liverpool, the plaintiff had there demanded the goods, and the defendants had agreed to hold them as warehousemen for him, thus putting an end to the *transitus*. The vendors nevertheless gave an indemnity to the defendants, and obtained delivery of the goods to themselves, so that they were the real defendants in the case. The plaintiff demanded the goods of the defendants, and on hearing that they had been returned to the vendors, brought his action on the 2d of June, in three counts: 1. Trover; 2. Against them as warehousemen; 3. As carriers. Up to the date of the trial, the vendors were *treating the contract as subsisting*, and relying on the right to stop *in transitu*; but on the cross-examination of the plaintiff and Adams at the trial, the defendants elicited sufficient facts

(a) 11 Ex. 577; 25 L. J., Ex. 166.

(b) L. R., 7 Ex. 26.

(c) So stated to the author by Mellor, Chamber.

J., in the presence of Blackburn, J., on the argument of a cause in the Exchequer

Clough v. London and North Western Railway Co.

to show a strong case of concerted fraud between the two to get possession of the goods, in order to sell them at auction, and retain the proceeds without paying for them. They were allowed to file a plea to that effect, and the jury found that the fraud was proved.

The Exchequer of Pleas decided in favor of the plaintiff, on the ground that the vendors had not elected to set aside the contract, nor offered to return the cash and acceptance, before delivering the plea of fraud at the trial after the cross-examination, and had up to that time treated the contract as subsisting: and further, on the ground that the rescission came too late after the plaintiff had acquired a vested cause of action against the defendants.

§ 660. On these facts it was held:

1st. That the property in the goods passed by the contract of sale: that the contract was not void, but only voidable, at the election of the defrauded vendor.

2d. That the defrauded vendor has the right to this election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts.

3d. That the vendor *may keep the question open* as long as he does nothing to affirm the contract; and that so long as he has made no election he retains the right to avoid it, subject to this—that if while he is deliberating an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, he will lose his right to rescind.

4th. That the vendor's election was properly made by a plea claiming the goods on the ground that he had been induced to part with them by fraud, and there was no necessity for any antecedent declaration or act *in pais*.

5th. That the vendor was not bound in his plea to tender the return of the money and acceptance, because they had been received, not from the plaintiff, but from Adams, who was no party to the action.

And, finally, that on the whole case the defendants were entitled to the verdict. (d) 19

(d) These principles were re-affirmed by the Ex. Ch. in *Morrison v. The Universal Marine Ins. Co.*, L. R., 8 Ex. 197, reversing the judgment of the Court of Exchequer, Id. 40.

19. A Suit For the Price Affirms the Sale.—In *Adler v. Fenton*, 24 How. 407,

411, the suit was for the price before the termination of the credit. Campbell, J., said: "In the present suit the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, though there is abundant testimony to show that the purchases were made with

the intention of defrauding their vendors. But the plaintiffs, by electing to sue for the price, have waived that fraud and confirmed the sale." See *Dellone v. Hull*, 47 Md. 112; *Dibbler v. Sheldon*, 10 Blatchf. 178; *Stoutenburgh v. Konkla*, 15 N. J. Eq. 33, 41; *Marsh v. Pier*, 4 Rawle 273; *Bulkley v. Morgan*, 46 Conn. 393. Taking security for the price after discovery of the fraud affirms the sale. *Joslin v. Cowee*, 52 N. Y. 90. In *Bulkley v. Morgan*, 46 Conn. 393, the seller brought suit for the price, but abandoned it because prematurely brought, and afterwards tried to rescind. *Park, C. J.*, said: "The plaintiff having affirmed the contract with full knowledge of all the facts, could not afterwards rescind it. He was bound by his affirmation." *Morford v. Peck*, 46 Conn. 380; *Mackinley v. McGregor*, 3 Whart. 369; *Kimball v. Cunningham*, 4 Mass. 502, 505; *Butler v. Hildreth*, 5 Metc. 49, 52; *Conihan v. Thompson*, 111 Mass. 270, 272; *Schiffer v. Dietz*, 83 N. Y. 300; *Emma Mining Co., Lim., v. Emma Co. of N. Y.*, 7 Fed. Rep. 424. In this case, *Choate, D. J.*, said that the bringing of an action to enforce the contract "deliberately and with full knowledge of the facts, is an election to affirm the contract. If such an action is brought by mistake, through inadvertence or misunderstanding of counsel, it may not have the effect of an estoppel; but the presumption is that it is done advisedly and by plaintiff's authority, and if there is any circumstance depriving the act of this character, such circumstance in excuse or avoidance of the act must be alleged by complainant." In the same case it was held that an action for deceit and recovery of damages against an agent who had, by false representations, procured a contract to be made, was not either an affirmance or disaffirmance by the plaintiff of the contract thus fraudulently made. An interesting case on this subject is that of *Dalton v. Hamilton*, 1 Han-
 nay (N. B.) 422. In that case one Turner,

who was agent for Hamilton, procured goods, representing himself to be agent for Dyall, to whom the goods were charged by the sellers. Turner took the goods to Dyall, who refused to receive them. Turner then delivered them to Hamilton, who paid Turner for them. The sellers not receiving the money, and Dyall repudiating the transaction, suit was brought for goods sold and delivered against Hamilton. *Ritchie, C. J.*, said: "We cannot arrive at any other conclusion than that, as plaintiffs have elected to proceed in *assumpsit*, they thereby set up Turner as their agent to make the sale to defendant, and they cannot deny his right to receive for them the payment; that having waived the tort and thus adopted the sale, they must adopt the whole transaction and rely on their remedy against Turner for the money received by him to their use." And the court said there could be no doubt that plaintiffs might have recovered against Hamilton and Turner, both, in trover. But in *Peters v. Ballistier*, 3 Pick. 495, the captain of a vessel sold a cargo without authority. The owner at first brought *assumpsit*, but discovering before trial that he had misconceived his remedy, he discontinued the suit and brought trover, which was sustained. On principle, this seems correct. In general, where a party is unsuccessful because he has not brought the proper form of action, he is not barred from his true remedy. It would seem that he ought to be barred by his election only where he has in fact two remedies, not where he resorts to a remedy which gives him no judgment on the merits. See *Butler v. Hildreth*, 5 Metc. 49, where this distinction is taken.

An Election to Avoid, After Discovery of the Fraud, is Conclusive.—When the election is made with knowledge of the facts, either to affirm or avoid the sale, such election is final, and the vendor cannot afterwards change his mind. *Pence v. Langdon*, 99 U. S. 578, 582. This is

§ 661. It is not necessary that there should be a judgment of court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party.

No judgment
necessary to
effect a rescis-
sion.

Thus, in *The Reese River Company v. Smith*,^(e) the House of Lords held the defendant entitled to have his name removed from the list of contributory shareholders in the plaintiff's company, although his name was on the register when the company was ordered to be wound up; on the ground that he had, prior to the winding-up order, notified his rejection of the shares, and commenced proceedings to have his name removed. On this ground the case was distinguished from *Oakes v. Turquand*.^(f)

*Reese River
Co. v. Smith.*

§ 662. In *Higsons v. Burton*,^(g) a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs goods in the name and as being for the account of the customer, and sent them at once to defendant, an auctioneer, for sale. Held, that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences, that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer.

*Higsons v.
Burton.*

In *Hardman v. Booth*,^(h) the plaintiff went to the premises of

well illustrated in *Moller v. Tuska*, 87 N. Y. 166, where the election to avoid was held final. The facts were these: The sellers brought an action to rescind the sale on the ground of fraud, and to recover possession of the goods from one to whom the defrauding buyer had conveyed them, with notice of the fraud. Pending the suit, the seller had proved his claim for the price against the estate of the fraudulent buyer, who had become bankrupt, and on the trial it was claimed that the suit to rescind could not be sustained because of this claim made under the contract. But Danforth, J., said: "The plaintiffs manifested their election by bringing this action. After that the other way of redress was not open to them, for according to Comyn, (Dig. Election C. 2.)

if a man once determines his election, it shall be determined forever. Hence they could never successfully assert a claim against the purchaser under the contract; for the election to disaffirm it had been manifested, and to revoke it was not in their power." Therefore it was held that the proof of claim in bankruptcy could not affect the previous election or the pending suit. See *Morris v. Rexford*, 18 N. Y. 552, 556; *Powers v. Benedict*, 88 N. Y. 605, 609.

(e) L. R., 4 H. L. 64; 2 Ch. 604.

(f) L. R., 2 H. L. 325.

(g) 26 L. J., Ex. 342.

(h) 1 H. & C. 803; 32 L. J., Ex. 105; *Hollins v. Fowler*, L. R., 7 H. L. 757; *Ex parte Barnett*, 3 Ch. D. 123.

Gandell & Co., a firm not previously known to him, but of high credit, to make sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell & Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he was selling to "Gandell & Co." The goods were pledged by Gandell & Todd with the defendant, an auctioneer, who made *bona fide* advances on them. The plaintiff's action was trover, and was maintained, all the judges holding that there had been no contract, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for the conversion. Hardman v. Booth.

§ 663. [And in *Lindsay v. Cundy*, (i) the same principle was applied. It appeared that a person named Alfred Blenkarn had hired a room in a house looking into Wood street, Cheapside, and from there had written to the plaintiffs, who were manufacturers, proposing to purchase goods of them. The letters were headed "37 Wood street, Cheapside," and the signature, "Blenkarn & Co.," was written so as to resemble the name "Blenkiron & Co." There was a firm of good repute who carried on business at 123 Wood street, under the style of "W. Blenkiron & Son." The plaintiffs, who were aware of the reputation of the firm of W. Blenkiron & Son, but did not know the number of their house of business, sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood street, Cheapside." Blenkarn sold some of the goods thus fraudulently obtained to the defendants, who were *bona fide* purchasers for value, and who resold them in the ordinary course of business. Blenkarn was afterwards convicted of the fraud. In an action for the conversion of the goods, it was held by the House of Lords, affirming the decision of the Court of Appeal, that as the plaintiffs had no knowledge of, and never intended to deal with Blenkarn, no contract of sale had ever existed between them; that the only persons with whom they had intended to deal were the well-known firm of Blenkiron & Co; that the property in the goods, therefore, remained in the plaintiffs, and the defendants were liable for their value.] ²⁰ Lindsay v. Cundy.

§ 664. In 1866, *Pease v. Gloahec*, (k) on appeal from the Admiralty

(i) 3 App. Cas. 459, *sub nom.* Cundy v. Lindsay: S. C., 2 Q. B. D. 96, C. A.; 1 Q. B. D. 348. (k) L. R., 1 P. C. 220; 3 Moo. P. C. (N. S.) 566. And see *Oakes v. Turquand*, L. R., 2 H. L. 325.

20. See *ante* § 649, note 16.

*Pease v.
Gloster.*

Court, was twice argued by very able counsel. After advisement, the Privy Council, composed of Lord Chelmsford, Knight Bruce, and Turner, L. JJ., Sir J. T. Coleridge, and Sir E. V. Williams, delivered an unanimous decision.

The principle laid down in *Kingsford v. Merry*, as stated by the Court of Exchequer (and not affected by the reversal of their judgment in the Exchequer Chamber), was affirmed to be the true rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

§ 665. [*Babcock v. Lawson*, (1) where the plaintiffs were pledgees and not the owners of the goods, illustrates the same principle. The plaintiffs had made advances to Denis Daly & Sons on the security of certain flour, warehoused in the plaintiffs' name. The defendants subsequently made advances to Denis Daly & Sons on the security of a pledge of the same flour, in ignorance of the prior transaction with the plaintiffs, and Denis Daly & Sons, by a fraudulent representation that they had sold the flour to the defendants, obtained a delivery order for it, which they gave to the defendants. The defendants accordingly obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for conversion:—*Held*, that assuming the plaintiffs, as pledgees, to have ever had a special property in the flour, they must be taken to have intended to revest the whole property in Denis Daly & Sons, in order that they might transfer it to the defendants as purchasers; and that although the plaintiffs might have revoked the delivery order as being procured by fraud, so long as the flour remained in the hands of Denis Daly & Sons, yet when the property in the flour had been transferred to the defendants for good consideration, the title of the latter was indefeasible. Cockburn, C. J., holding the analogy between the case under consideration and one where a vendor is induced to part with the property by fraud to be

(1) 4 Q. B. D. 394, affirmed 5 Q. B. D. 284, C. A.

complete; and the decision of the Queen's Bench Division was affirmed on appeal.

And in this case, and in *Moyce v. Newington*, (*m*) Cockburn, C. J., lays down in the broadest possible manner that the courts were prepared to hold, that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud, citing with approval the decision of the Supreme Court of Judicature of the State of New York in the case of *Root v. French*, (*o*) where the preference thus given to the right of the innocent purchaser is treated as ^{*Root v. French.*} an exception to the general law, and is rested on the above general principle of equity.]

§ 666. It is a fraud on the vendor to prevent other persons from bidding at an auction of the goods sold, and where the buyer had, by an address to the company assembled at the auction, persuaded them that he had been wronged by the vendor, and that they ought not to bid against the buyer, the purchase by him was held to be fraudulent and void. (*p*) 21

It is a fraud on vendor to prevent others from bidding at auction sale.

(*m*) 4 Q. B. D. 32, *ante* § 12.

(*o*) 13 Wendell 570. And see the American decisions, cited *post* § 673.

(*p*) *Fuller v. Abrahams*, 3 B. & B. 116.

21. Interference With Auction Sales.

—If one obtains property at auction by preventing others from bidding, the sale may be avoided. This applies to judicial as well as private sales. In *Slater v. Maxwell*, 6 Wall. 268, and in *Cocks v. Izard*, 7 Wall. 559, the buyer dissuaded bidders by falsely representing himself as looking after the interests of the owners, and the sales were set aside. In *Jackson v. Morter*, 82 Penna. 291, the buyer falsely represented the encumbrances on the property to be greater than they were in fact. But where, at an execution sale, the buyer procured the goods at an under-value by *truthfully* representing that he was buying for the benefit of the debtor, it was held that the sale could not be avoided therefor. *Dick v. Cooper*, 24 Penna. 217, 221. Combinations of individuals to buy jointly have been held fraudulent. But the modern doctrine is

thus stated in *Kearny v. Taylor*, 15 How. 494, 521, by Nelson, J., in United States Supreme Court: "If it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing the association to participate in the bidding, the sale should be upheld; otherwise, if for the purpose of shutting out competition and depressing the sale, so as to obtain the property at a sacrifice." See *Jenkins v. Frink*, 30 Cal. 586; *Phippen v. Stickney*, 3 Metc. 384; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Marie v. Garrison*, 83 N. Y. 14, 28. An agreement by one for a consideration, not to bid against the buyer, whereby the latter obtains the property at a reduced price, is fraudulent. *Morris v. Woodward*, 25 N. J. Eq. 32; *Slingluff v. Eckel*, 24 Penna. 472; *Gardiner v. Morse*, 25 Me. 140. In *Fennor v. Tucker*, 6 R. I. 551, a sale was avoided because the buyer had persuaded a rival bidder to withdraw his bid, out of favor.

Where the fraud on the vendor consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from that third person, the price may be recovered from the defendant as though he had bought directly in his own name, for his possession of the vendor's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence. (g)

Where vendor is induced by fraud to sell to an insolvent third person.

Hill v. Perrott.

In *Biddle v. Levy*, (r) the defendant told plaintiff that he was about to retire from business in favor of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiff, who sold to the son goods to the value of £800. The representations were false and fraudulent, and Gibbs, C. J., held an action *for goods sold and delivered* to be maintainable against the father.

These two cases probably rest on the principle that the nominal purchasers were secret agents buying for the parties committing the fraud, who were really the undisclosed principals. (s) 22

§ 667. Where, however, the fraud on the vendor is effected by means of assurances given by a third person of the buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by the 6th section of Lord Tenterden's act (9 Geo. IV., c. 14,) which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon, (t) unless such representation or assurance be made in writing, signed by the party to be charged therewith." 23

Fraud by means of false representations of buyer's solvency by third person must be proven by written evidence.

The construction of this section was much debated in the case of *Lyde v. Barnard*, (t) in which the judges of the Exchequer were equally divided, but the case had no reference to a

Lyde v. Barnard.

(g) *Hill v. Perrott*, 3 Taunt. 274.

(r) 1 Stark. 20.

(s) *Thompson v. Davenport*, 2 Sm. L. C., at p. 387.

22. *Meyer v. Amidon*, 23 Hun 553.

(t) This word "upon" is perhaps a mis-

take for "thereupon:" perhaps the words ought to be "money or goods upon credit." See remarks of the judges in *Lyde v. Barnard*, 1 M. & W. 101.

23. Similar statutes have been passed in Maine, Vermont, Massachusetts, Vir-

sale of goods. In *Haslock v. Ferguson*, (u) the action was against the defendant for an alleged fraudulent declaration to the plaintiff that one Barnes was of fair character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The court held that parol evidence of the alleged representation was inadmissible, overruling a distinction which Sir John Campbell, for the plaintiff, attempted to support, "that the gist of the action was not the misrepresentation of character, but the wrongful acquisition of property by the defendant."

Haslock v. Ferguson.

In *Devaux v. Steinkeller*, (x) it was held that a representation made by a partner of the credit of his firm was a representation of the credit of "another person" within the meaning of this statute; and in *Wade v. Tatton*, (y) in the Exchequer Chamber, that where there were both verbal and written representations, an action will lie if the written representations were a material part of the inducement to give credit.

Devaux v. Steinkeller.

Representation by partner of credit of his firm.

Wade v. Tatton.

§ 668. The effect of concealment or false representations made by the buyer with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the courts. Chancellor Kent carries the doctrine on the subject of fraud much further than could be shown to be maintainable by decided cases, and states it in broader terms than are deemed tenable by the later editors of his Commentaries. (z) Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." 24

False representations by buyer in order to get goods cheaper.

ginia, Alabama, Kentucky, Indiana, Missouri and Michigan. See Browne on Stat. Frauds, § 181, note 2.

(u) 7 Ad. & E. 86.

(x) 6 Bing. (N. C.) 84.

(y) 25 L. J., C. P. 240. See, also, *Swan v. Phillips*, 8 Ad. & E. 745; *Turnley v. McGregor*, 6 M. & S. 46; *Pasley v. Freeman*, 3 T. R. 51.

(z) 2 Kent 483, (12th ed.)

24. Duty of Disclosure.—See *ante* §

640, notes 6 and 7, and § 641, note 9, and see *post* § 732, note 50. The buyer need not disclose to the seller facts of which information is open equally to both. *Kintzing v. McElrath*, 5 Penna. 467; *Butler's Appeal*, 26 Penna. 63; *Gartner v. Barnetz*, 1 Yeates 307. *Laidlaw v. Organ*, 2 Wheat. 178, is the leading American case. See *ante* § 640, note 6. Where a trustee buys the trust property from his *cestui que trust*, the fullest disclosure is

§ 669. The courts of equity even fall far short of this principle,

In equity, purchaser not bound to acquaint vendor with latent advantages of thing sold.

Fox v. Mackreth.

Turner v. Harvey.

But purchaser must not mislead vendor in such a case.

and both Lord Thurlow and Lord Eldon held that a purchaser was not bound to acquaint the vendor with any latent advantage in the estate. In *Fox v. Mackreth*, (a) Lord Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, of which he knew the seller was ignorant, and that a court of equity could not set aside the sale, though the estate was purchased for a price of which the mine formed no ingredient. Lord Eldon approved this ruling in *Turner v. Harvey*. (b) But in the latter case Lord Eldon also held that if the least word be dropped by the purchaser to mislead the vendor in such a case, the latter will be relieved; and his Lordship accordingly decided that the agreement for the sale in that case should be given up to be canceled. The facts were that the purchaser of a reversionary interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

§ 670. At common law, the only case decided *in banco*, that has been found on this point is *Vernon v. Keys*, (c) in which the declaration was in case, and a verdict was given for

At common law, *Vernon v. Keys*.

necessary, and this principle applies to dealings between solicitor and client, and between others holding relations of trust. *Dambmann v. Schulting*, 75 N. Y. 55, 62. But it has been held that a director may buy shares of stock from a stockholder in the company without disclosing facts affecting the value. This is perhaps because the director is trustee for the company and not for the stockholders, yet it seems doubtful law. *Carpenter v. Danforth*, 52 Barb. 581; *Board of Tippecanoe Co. v. Reynolds*, 44 Ind. 509; *Fisher v. Budlong*, 10 B. I. 525. In *Bench v. Sheldon*, 14 Barb. 66, the seller had lost his flock of sheep. They had been found and advertised by the finder; and this fact was known to the buyer, and not to the seller. The seller thinking that the chance of finding them was desperate sold them for a trifle, the buyer in the course of the bargaining saying that he

did not suppose the seller would ever find them. *Johnson, J.*, said that he was clearly of opinion that the buyer was under no duty to disclose, but that the statement that he did not believe the sheep would ever be found was a false statement, and therefore the seller could avoid for fraud. See *Hadley v. Clinton Co.*, 13 Ohio St. 502; *Paul v. Hadley*, 23 Barb. 521; *Dambmann v. Schulting*, 75 N. Y. 55, 62; *Prescott v. Wright*, 4 Gray 461, 464; *Smith v. Countryman*, 30 N. Y. 655, 670, 681; *Howard v. Gould*, 28 Vt. 523. A stricter rule prevails in Vermont. See post § 732, note 50.

(a) 2 Bro. C. C. 400. For the judgment of Lord Thurlow, see 2 Cox Eq. Cas. 320.

(b) Jacob 178.

(c) 12 East 632, and in Ex. Ch., 4 Taunt. 438.

the plaintiff on the third count, which alleged that the plaintiff, being desirous of selling his interest in the business, stock in trade, &c, in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale, that the defendant was about to enter into partnership to carry on the business with other persons, *whose names defendant refused to disclose*, and that *these persons* would not consent to give plaintiff a larger price than £4500 for his share, while the truth was that these persons were willing that the defendant should give as much as £5291 8s. 6d. The judgment in favor of plaintiff was arrested, Lord Ellenborough giving the opinion of the court after advisement. His Lordship said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer, and that this could not maintain the verdict, unless it was shown "that in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he states at all, the motives which operate with him for treating, or for making the offer he in fact makes. A seller is unquestionably liable, to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars which *the buyer has not equal means with himself of knowing*, or if he do so in such manner as to *induce the buyer to forbear making the inquiries* which, for his own security and advantage, he would otherwise have made. But is a *buyer* liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognized principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum*, by the bidder, in respect to which the bidder was under *no legal pledge or obligation to the seller* for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance therefore he can maintain no action."

When the case came before the Exchequer Chamber, (d) Puller, in argument, insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*, and that there was no case in which

(d) 4 Taunt. 488.

it had been held that an action would not lie under such circumstances; but the court would hear no reply, and at once confirmed the judgment, Sir James Mansfield, C. J., simply saying: "The question is whether the defendant is bound to disclose the highest price he chooses to give, or whether he be not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase."

§ 671. In *Jones v. Franklin*, (e) *coram Rolfe, B.*, at Nisi Prius, the action was *trover*, and the circumstances were that the plaintiffs, assignees of a bankrupt, were owners of a policy for £999, on the life of one George Laing, and early in 1840 had endeavored through their attorney, to sell it for £40, but could find no purchaser. Defendant knew this fact. On the 15th of August Laing became suddenly very ill, and he died on the 20th. On the 18th defendant employed one Cook to buy the policy for the defendant, and to give as much as sixty guineas for it. The vendor asked Cook when he applied to buy it what he thought it would be worth, and Cook said about sixty guineas. Cook and the defendant both knew that Laing was in imminent danger, but did not inform the vendor, who was ignorant of it, and sold the policy at that price, supposing Laing to be in good health. Rolfe, B., said, "there could be no doubt such conduct was grossly dishonorable. But he had no difficulty in going further than this, and telling the jury that if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired."

§ 672. It does not seem possible to reconcile this case with *Vernon v. Keys*. In both cases the purchasers made a false representation. But in *Vernon v. Keys*, the falsehood was volunteered, and misrepresented a *fact*; whereas in *Jones v. Franklin*, the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the vendor as to his *opinion*, and according to Lord Ellenborough, the buyer was "under no legal duty or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for "the consequences of his own indiscretion in relying on it." There was, perhaps, enough in the case to bring it within the principle of *equity* laid down by Lord Eldon in *Turner v. Harvey*, (f) but

Case not reconcilable with *Vernon v. Keys*.

(e) 2 Moo. & R. 348.

(f) Jac. 169.

dishonorable and unfair as was the conduct of the buyer, it would be difficult to show, on authority, that it was in law such a fraud as vitiated the sale.

§ 673. In America it has been held, that if a purchaser make false and fraudulent representations as to his own solvency, and means of payment, and thereby induces the vendor to sell to him on credit, no right either of property or possession is acquired by the purchaser, and the vendor would be justified in retaking the property, provided he could do so without violence. (g)

*Decisions in
America.*

[And the Supreme Court of the United States has decided that a purchaser of goods, who, without making any fraudulent representations as to his solvency, conceals from the vendor his insolvent condition, and thereby induces him to sell the goods on credit, is guilty of such a fraud as entitles the vendor to disaffirm the contract and recover the goods; if in the meantime no innocent person has acquired an interest in them. (h) It would seem, therefore, that in America, as in England, the contract is treated as voidable and not void. Some of the decisions, however, given in the states, proceed upon the principle that where the buyer does not intend to pay for the goods, the contract is absolutely void (except by estoppel as against the buyer, if the vendor chooses to affirm it), because it is not the intention of both parties to be bound by it. (i) In both countries, however, the rights of innocent purchasers from a fraudulent vendee are protected, and it seems to be of no practical importance whether the protection is granted on the ground that the original contract of sale is valid until disaffirmed, or whether this result follows from the equitable doctrine, that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.]

SECTION III.—FRAUD ON THE BUYER.

§ 674. In every case where a buyer has been imposed on by the fraud of the vendor, he has a right to repudiate the contract, a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. The buyer

*Buyer defrauded by
vendor may
avoid the sale.*

(g) *Hodgedon v. Hubbard*, 18 Vt. 504; *Johnson v. Peck*, 1 Wood. & Min. (Mass.) 334; *Mason v. Crosby*, 1 Wood. & Min. 342.

(h) *Donaldson v. Farwell*, 3 Otto 631; see, also, *Root v. French*, 13 Wend. 570.

(i) *Per Doe, J.*, in *Stewart v. Emerson*, 52 N. H. 301, at p. 318, where all the authorities, English and American, are discussed; and see the remarks of Cockburn, C. J., in *Moyce v. Newington*, 4 Q. B. D. 35, *ante* § 665.

under such circumstances may refuse to accept the goods, if he discover the fraud before delivery, or return them, if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods, in the same state in which he received them. (j) ²⁵ And this ability to restore the thing purchased unchanged in condition is indispensable to the exercise of the right to rescind, so that if the purchaser has innocently changed that condition while ignorant of the fraud he cannot rescind. (k) ²⁶

(j) *Clark v. Dickson*, E., B. & E. 148, and 27 L. J., Q. B. 223; *Murray v. Mann*, 2 Ex. 538; *Street v. Blay*, 2 B. & Ad. 456.

25. **The Buyer may Rescind for the Seller's Fraud.**—*Pence v. Langdon*, 99 U. S. 578; *Cheongwo v. Jones*, 3 Wash. C. C. 359; *Daggett v. Emerson*, 3 Story 700; *Cushwa v. Forrest*, 4 Cranch C. C. 37; *Croyle v. Moses*, 90 Penna. 250; *Lowry v. McLane*, 3 Grant 333; *Kimball v. Cunningham*, 4 Mass. 502; *Coolidge v. Brigham*, 1 Metc. 547; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Cruess v. Fessler*, 39 Cal. 336 (In this case an avoidance was sustained for misrepresentation as to the value of the good will of a business sold.) *Morrison v. Lods*, 39 Cal. 331; *Gifford v. Carvill*, 29 Cal. 589; *Merritt v. Robinson*, 35 Ark. 483; *First National Bank v. Yocum*, 11 Neb. 328; *Poor v. Woodburn*, 25 Vt. 234; *Gates v. Bliss*, 43 Vt. 299; *Prentiss v. Russ*, 16 Me. 30; *Perkins v. Bailey*, 99 Mass. 61; *Waters Patent Heater Co. v. Smith*, 120 Mass. 444; *Warren v. Tyler*, 81 Ill. 15; *Foulk v. Eckert*, 61 Ill. 318; *Hall v. Fullerton*, 69 Ill. 448; *Baker v. Lever*, 67 N. Y. 304.

(k) *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 145; cases, *ante* § 606.

26. **Return of Property.**—See *ante* § 606, note 2. If the property purchased is of any value whatsoever, it must be returned by the buyer before he can rescind. But if it is entirely worthless it need not be returned. A complaint, therefore, by a buyer, in a suit depending on rescission, must either allege offer to return, or that

the property is worthless. *Perley v. Balch*, 23 Pick. 283; *Fitz v. Bynum*, 55 Cal. 459; *Morrison v. Lods*, 39 Cal. 331; *Merritt v. Robinson*, 35 Ark. 483. (In this case the offer to return the property was made on Sunday, and was held insufficient for that reason. But see *Pence v. Langdon*, 99 U. S. 578.) *Bacon v. Brown*, 4 Bibb 91; *First National Bank of Barnsville v. Yocum*, 11 Neb. 328; *Downer v. Smith*, 32 Vt. 1, 7; *Gates v. Bliss*, 43 Vt. 299. (In this case it is held that the buyer must clearly signify his purpose to rescind for the fraud. A mere negotiation for a settlement, or offer to trade back, would not suffice. See *McCulloch v. Scott*, 13 B. Mon. 172.) *Getchell v. Chase*, 37 N. H. 106, 110; *Weeks v. Robie*, 42 N. H. 316, 322; *Willoughby v. Moulton*, 47 N. H. 205; *Butler v. Northumberland*, 50 N. H. 33; *Sanborn v. Batchelder*, 51 N. H. 426, 434; *Manahan v. Noyes*, 52 N. H. 232; *Spencer v. St. Clair*, 57 N. Y. 1. (In this case it was held that a note must be returned, though worthless, before the party who received it could rescind. But this does not accord with the weight of authority.) *Jemison v. Woodruff*, 34 Ala. 143; *Shaw v. Barnhart*, 17 Ind. 183; *Rose v. Hurley*, 39 Ind. 77; *Haase v. Mitchell*, 58 Ind. 213; *Jennings v. Gage*, 13 Ill. 610; *Smith v. Bittenham*, 98 Ill. 188; *Baker v. Lever*, 67 N. Y. 304. (In this case it is held that the fraudulent vendor cannot set up negligence of the buyer in discovering the fraud as a defence to a suit for rescission.)

§ 675. But the contract is *only voidable, not void*, and if after discovery of the fraud he acquiesces in the sale by express words or by any unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property.²⁷ Mere delay also may have the same effect, if, while deliberating, the position of the vendor has been altered; (2) and the result will not be affected by the buyer's subsequent discovery of a new incident in the fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.²⁸

Farrell v. Corbett, 4 Hun 128; *Van Liew v. Johnson*, 4 Hun 415; *Dows v. Griswold*, 4 Hun 550, 556.

The Defrauded Buyer May Recover for Repairs on Property Returned.—If the buyer has expended money in repairing the property before he discovers the fraud, he may rescind by returning the property and recover for these repairs in *assumpsit*. *Wright v. Haskell*, 45 Me. 489; *Farris v. Ware*, 60 Me. 482; *Canada v. Canada*, 3 Cush. 15. These are cases of sales of real estate, but the principle would seem to apply to personalty.

Imperfect Restoration by Guilty Party.—If the guilty party has disposed of part of property received by him, he cannot thereby prevent a rescission. The party defrauded may elect to take a partial restoration. *Hammond v. Pennock*, 61 N. Y. 145.

Depreciation of the Property will not Destroy the Right to Rescind.—*Veazie v. Williams*, 8 How. 134, 158; *Neblett v. Macfarland*, 92 U. S. 101, 104.

27. Acquiescence will Waive the Right to Avoid.—*Kimball v. Cunningham*, 4 Mass. 502; *Leaming v. Wise*, 73 Penna. 173; *Downer v. Smith*, 32 Vt. 1, 8; *Weeks v. Robie*, 42 N. H. 316, 320; *Thompson v. Lee*, 31 Ala. 292, 303; *Evans v. Montgomery*, 50 Iowa 325, 337; *Grymes v. Sanders*, 93 U. S. 55, 62. See *ante* § 660, note 19.

(1) *Clough v. London and North Western Railway Co.*, *ante* §§ 659, 660

28. Mere Delay may Waive the Right to Avoid.—In *Leaming v. Wise*, 73 Penna. 173, the buyer sued to recover the price paid for oil-stocks. There was a delay to rescind for four months, during which the buyer was searching for oil on the lands of the company. The court held that the delay was too great: "The plaintiffs could not take the chance of the speculation, and at the same time repudiate the contract if it turned out to be a losing bargain." In this case the stocks had fallen in price in the interim; but mere delay was held sufficient in *Collins v. Townsend*, 58 Cal. 608, 614, and in *Gifford v. Carvill*, 29 Cal. 592. See, also, *Herrin v. Libbey*, 36 Me. 357; *Burton v. Stewart*, 3 Wend. 239; *Blen v. Bear River, &c., Co.*, 20 Cal. 602; *Willoughby v. Moulton*, 47 N. H. 205; *Hall v. Fullerton*, 69 Ill. 448; *Evans v. Montgomery*, 50 Iowa 325, 337; *Rawson v. Harger*, 48 Iowa 269, 274; *Parmlee v. Adolph*, 28 Ohio St. 10, 17. A better doctrine, however, would seem to be that of the text, that mere delay after discovery of the fraud would not deprive the defrauded buyer of the right to rescind, unless the seller's position should be altered in the interim. See *ante* § 660; *Whitcomb v. Denio*, 52 Vt. 382, 390. In *Dayton v. Monroe*, 47 Mich. 193, the suit was for conversion of a horse obtained by a fraudulent purchase. The defence claimed waiver by delay to rescind. *Campbell, J.*, said: "Delay alone, while it may have some

§ 676. These principles are well illustrated in the case of *Campbell v. Fleming*.^(m) The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. After the purchase he discovered the fraud, and that the whole scheme of the company was a deception. The action was brought to recover the purchase money that he had paid. But it appeared that subsequently to the discovery of the fraud, the plaintiff had treated the shares as his own, by consolidating them with other property in the formation of a new company, in which he sold shares, and realized a considerable sum. The plaintiff then endeavored to get rid of the effect of the confirmation of the contract, resulting from his dealing with the shares as his own, by showing that at a still later period he had discovered another fact, namely, that only £5000 had been paid for the purchase of property by the mining company, although it was falsely represented to the plaintiff when he took the shares that the outlay had been £35,000. The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the judges held the nonsuit right. Littledale, J., said: "After the plaintiff learned that an imposition had been practiced on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained, *he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.*" Parke, J., said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; *and the fraud could do no more than entitle him to rescind.*" Patteson, J., concurred, and said: "Long afterwards he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and *it cannot revive the right of repudiation which has been once waived.*" Lord Denman, C. J., said: "There is no authority for saying that a party must know *all the incidents of a fraud before he deprives himself of the right of rescinding.*"⁽ⁿ⁾ 29

bearing on the fraud, as affecting plaintiffs' conduct, cannot be, in a court of law, a bar to suit, unless coming within the statute of limitations. In all controversies not within the statute, waiver, if relied on, is a question of fact and not of law."

(m) 1 Ad. & E 40.

(n) See *ante* § 659, as to election, and the case of *Clough v. London and North Western Railway Co.*, L. R., 7 Ex. 26, there cited.

29. Affirmance After Partial Discovery of Fraud.—On the other hand, in *Pierce v. Wilson*, 34 Ala. 596, 609, the court

[The very recent case of *Redgrave v. Hurd* (o) before the Court of Appeal decides two important points with reference to the buyer's right to have a contract rescinded on the ground of fraud—

Redgrave v. Hurd.

1. When the seller has made a false representation which from its nature might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to enter into the contract, and it does not rest with him to show that he in fact relied upon the representation. 30

(1) Buyer is presumed to have acted in reliance upon the false representation, unless the contrary be proved

In order to displace this inference the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms or showed by his conduct that he did not rely upon the representation but acted upon his own judgment.

2. Where the buyer relies on the seller's representation, he is not deprived of his right to relief because he had the means of discovering that the representation was false.] 31

(2) Buyer is not deprived of his right to relief by reason of non-inquiry.

§ 678. The rules of law defining the elements which

rescinded a sale after three years' delay to file a bill therefor, on the ground that the buyer was not at first *fully* apprised of the fraud. The subject of sale was a patent right in looms for the State of Tennessee. The false representations related first, to the fitness of the machine to be worked by hand, and second, to its fitness for use in factories. About three months after the sale the buyer found that the first class of representations was false and offered to rescind. The seller refusing, the buyer made efforts to sell, (unsuccessfully), and tested the machine in factories, for which he found it useless. Being then sued for the price, he filed a bill (three years having elapsed since the offer to rescind) to set aside the contract. The suit was sustained, on the ground that full discovery of the fraud was not made until the trial in a factory, and on the further ground that by the first offer to rescind the buyer had perfected his right of action.

(o) 20 Ch. D. 1, C. A. (reversing the decision of Fry, J.,) where the opinions

of Lords Cottenham and Brougham and Earl Devon, in *Attwood v. Small*, 6 Cl. & F. 232, relied upon in the court below, are considered and explained by Jessel, M. R., at pp. 14-17.

30. *Fishback v. Miller*, 13 Nev. 423, 443; *Holbrook v. Burt*, 22 Pick. 546, 552.

31. The defrauding vendor cannot set up the buyer's negligence in permitting or discovering the fraud, as a defence to an avoidance. *Jackson v. Collins*, 39 Mich. 557, 561; *Baker v. Lever*, 67 N. Y. 304; *Bank of Woodland v. Hiatt*, 58 Cal. 234. In *Kendall v. Wilson*, 41 Vt. 567, 571, the article sold was a perpetual motion machine. The motion was produced by concealed clock-work. The buyer discovering the cheat, sued to recover back the price. The defence was that the buyer was bound to know that it was a humbug. But the court sustained a recovery saying, "the law will afford relief even to the simple and credulous who have been duped by art and falsehood."

What elements are necessary to entitle buyer to rescind sale on ground of fraud, or to maintain an action of deceit.

False representation not sufficient if innocently made.

are essential to constitute such fraud as will enable a purchaser to avoid a sale were long in doubt, and there was specially a marked conflict of opinion between the Court of Queen's Bench and the Exchequer, until the decisions of the Exchequer Chamber in *Evans v. Collins*, (p) in 1844, and *Ormrod v. Huth*, (q) in 1845, established the true principle to be that a *representation, false in fact*, gives no right of action if *innocently made* by a party who believes the truth of what he asserts; and that in order to constitute fraud, there must be a false representation *knowingly made, i. e., a concurrence of fraudulent intent and false representation. And a false representation is knowingly made, when a party for a fraudulent purpose states what he does not believe to be true, even though he may have no knowledge on the subject.* These decisions bring back the law almost exactly to the point at which it was left by the King's Bench in the great leading cases of *Pasley v. Freeman*, (r) and *Haycraft v. Creasy*, (s) decided in 1789 and 1801. 32

[The above rules must be taken subject to the qualification herein-after noticed (*post* § 691) with regard to reckless statements.]

(p) 5 Q. B. 820.

(q) 14 M. & W. 650.

(r) 3 T. R. 51; 2 Sm. L. C. 66, (8th ed.)

(s) 2 East 92.

§2. Innocent Misrepresentations are not Fraudulent.—See *ante* § 638. It is generally true that there must be fraudulent intent to constitute such fraud as will avoid a contract of sale; but as we have seen (*ante* § 628, *et seq.*) where the false statements amount to a warranty, it is held in many states that the buyer may rescind, though they were innocently made. The general principle, however, is that if the party making the false statements honestly believes them to be true, the contract cannot be avoided, for *fraud*. The statement must be both false and fraudulent. *Lord v. Goddard*, 13 How. 198, 211; *Gregory v. Schœnell*, 55 Ind. 101, quoted note 3, *ante*; *Taylor v. Luthe*, 26 Ohio St. 428; *Farmlee v. Adolph*, 28

Ohio St. 10, 20; *Wheeler v. Randall*, 48 Ill. 182; *Bird v. Foreman*, 62 Ill. 212; *Merwin v. Arbuckle*, 81 Ill. 601; *Tone v. Wilson*, 81 Ill. 529, 533; *Clements v. Boone*, 5 Brad. 109; *Mason v. Chappell*, 15 Gratt. 572; *Sims v. Eiland*, 57 Miss. 83, 607; *Klein v. Rector*, 57 Miss. 538; *Nelson v. Lulling*, 46 How. Pr. (N. Y.) 355; *Marnlock v. Fairbanks*, 46 Wis. 415; *King v. Eagle Mills*, 10 Allen 548; *Kimbell v. Moreland*, 55 Ga. 164; *Sanford v. Cloud*, 17 Fla. 557, 572; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314, 324; *Rawson v. Harger*, 48 Iowa 271; *Page v. Parker*, 40 N. H. 47; *Pettigrew v. Chellis*, 41 N. H. 95, 99; *Hanson v. Eilgerly*, 29 N. H. 343; *Merchants Bank v. Sells*, 3 Mo. App. 85; *Righter v. Rolier*, 31 Ark. 170, 174; *Bigler v. Flickinger*, 55 Penna. 279, 283; *Allen v. Wanamaker*, 31 N. J. L. 370; *Searing v. Lum*, 2 South. 683; *Lamm v. Port Deposit, &c., Co.*, 49 Md. 233, 240.

The effect of innocent misrepresentation as causing Mistake or Failure of Consideration has been treated *ante* § 614, *et seq.* 33

§ 679. In the former of these cases it was held, that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the Pasley v. Freeman. ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. *Pasley v. Freeman* was an action brought against a party for damages, for falsely representing a third person to be one whom the plaintiff could safely trust, the *defendant well knowing* that this was not true.

In the latter case, *Haycraft v. Creasy*, it was held, that an action of deceit would *not* lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if the representations were made *bona fide with a belief in their truth*. Haycraft v. Creasy.

§ 680. After a series of intervening cases, that of *Foster v. Charles* (t) came twice before the Common Pleas in 1830 and 1831, and was deliberately approved and followed by the Queen's Bench in *Polhill v. Walter*, (u) in 1832. It was held in these cases unnecessary to prove "a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. It is enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is *calculated to induce another to act on the faith of it* in such a way as that he may incur damage, and that damage is actually incurred. A willful falsehood of such a nature is in the legal sense of the word, a *fraud*." Foster v. Charles. Polhill v. Walter. Motive unimportant.

[And upon the question of motive the judgment in *Polhill v. Walter* is fully confirmed by the observations of Lord Cairns in *Peek v. Gurney*, (w) who says: "In a *civil* proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? and if there was, *however innocent the motive may have been*, your Lordships will be obliged to arrive at the consequences which properly would result from what was done."]

33. See *ante* § 738, note 4.

(t) 6 Bing. 396, and 7 Bing. 106.

(u) 3 B. & Ad. 122.

(w) L. R., 6 H. L., at p. 409, and see *Leddell v. McDougall*, 29 W. R. 403, C. A.

directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bona fide*."

§ 683. Parke, B., pointed out that the representation was no part of the contract, which was in writing, and therefore it could not affect the rights of the parties, except on the ground that it was fraudulent. On the simple facts, each person was innocent, because the plaintiff made no false representation himself, and although his agent did, the agent did it innocently, not knowing it to be false; and the proposition seemed untenable that if each was innocent, the act of either or both could be a fraud.* It was conceded that an innocent principal would be bound if his agent committed a fraud, but in the case presented, the agent acted without fraudulent intent. It was also conceded that "if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and at the same time suspecting or believing that it would by reason of such ignorance be answered in the negative, the plaintiff would unquestionably be guilty of a fraud." (a) His Lordship deemed it immaterial whether the making of such representations as were made by the agent was within the scope of his authority or not, as they could not affect the contract unless *fraudulent*. Lord Abinger, C. B., gave an elaborate dissenting opinion, in which he held "that it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude; * * * the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth are both said in the language of the law to be fraudulent, although the party making them suppose them to be correct;" that there was not a total absence of moral turpitude in the agent, even upon the presumption that he was wholly ignorant of the matter: that "nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation;" that it did not follow because the plaintiff was not bound by the representation of the agent, even if made without authority, that "he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. *It is one thing to say that he may avoid a contract if his agent without his authority*

(a) See *Ludgater v. Love*, 44 L. T. (N. S.) 694, C. A., post § 698.

has inserted a warranty in the contract, and *another to say that he may enforce a contract obtained by means of a false representation made by his agent*, because the agent had no authority." (See observations on this case, *post* § 697.)

§ 684. In *Fuller v. Wilson*, (b) which was an action on the case for a false representation, the Queen's Bench, through Lord Denman, C. J., declined to take any ground other than the broad proposition of Lord Abinger, which they adopted, "that whether there was a moral fraud or not, if *the purchaser was actually deceived in his bargain, the law will relieve him from it*. We think the principal and his agent are for this purpose completely identified, and that the question is not what was passing in the mind of either, but *whether the purchaser was in fact deceived by them or either of them*."

Conflict of
opinion be-
tween the
Queen's
Bench and
Exchequer.

The conflict of opinion cannot be more plainly stated. The Queen's Bench thought the sole test was whether the *purchaser was deceived by an untrue statement into making the bargain*. The Court of Exchequer thought it further necessary that the party making the untrue statement *should know it to be untrue*.

Fuller v. Wilson was reversed in error, (c) solely on the ground that the facts of the case did not show any misrepresentation on the part of the vendor, but only the purchaser's own misapprehension; and Tindal, C. J., in delivering the opinion, stated that the court did "not enter into the question discussed in *Cornfoot v. Fowke*."

§ 685. In *Moens v. Heyworth*, (d) in 1842, the question again came before the Exchequer of Pleas, (the case of *Fuller v. Wilson* not being yet reported,) and Lord Abinger renewed the expression of his dissent from Parke, B., and Alderson, B., repeating that "the fraud which vitiates a contract, * * * does not in all cases necessarily imply moral turpitude." His Lordship instanced the sale of a public house, and an untrue statement by the seller that the receipts of the house were larger than was the fact, but the untrue statement might be made without dishonest intent, as if proper books had not been kept. In such case his Lordship insisted that the purchaser might maintain an action on the false representation, even though the vendor did not know that it was false when made. The other judges held the contrary, Parke, B., saying distinctly, that in such cases "it is essential that there should be moral fraud."

(b) 3 Q. B. 58.

(d) 10 M. & W. 147.

(c) *Wilson v. Fuller*, 3 Q. B. 1009.

§ 686. In the next year, 1843, *Taylor v. Ashton* (e) came before the same court, and the judgment of the Queen's Bench in *Fuller v. Wilson* was relied on by the plaintiff, but Parke, ^{*Taylor v. Ashton.*} B., said when it was cited: "I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud, and Lord Denman seems to admit that to be so. If the party *bona fide believes* the representation he made to be true, though he does not *know* it, it is not actionable." The learned Baron afterwards delivered the judgment of the court, *holding* that "it was not necessary, in order to constitute fraud, to show that the defendants *knew* the fact to be untrue: it was enough that the fact was untrue *if they communicated that fact for a deceitful purpose*; * * * if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

§ 687. In 1843, the Queen's Bench had before them the case of *Evans v. Collins*, (f) which was an action by a sheriff to recover damages against an attorney for falsely represent- ^{*Evans v. Collins.*} ing a certain person to be the person against whom a *ca. sa.* had been sued out by the attorney, so that the sheriff had been induced to take the wrong person into custody, and had thereby incurred damage. The jury found that the defendant had probable reason for believing that the person pointed out to the sheriff was really the person against whom the *ca. sa.* was issued, so that there was clearly a total absence of moral turpitude. It had, however, been previously held, in *Humphrys v. Pratt*, (g) in the House of Lords, that an execution creditor was bound to indemnify a sheriff who had seized goods pointed out by the creditor, and upon his requisition and false representation that they belonged to his debtor, although the counts in the declaration did not aver any knowledge or belief on the part of the execution creditor that his representation was false. On the authority chiefly of this decision in the House of Lords, Lord Denman, C. J., held the action in *Evans v. Collins* maintainable, but he added: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame: but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not

(e) 11 M. & W. 401.

(g) 5 Bligh (N. S.) 154.

(f) 5 Q. B. 804.

know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation *that the defendant knew his representation to be false is therefore immaterial*: without it, the declaration discloses enough to maintain the action."

§ 688. This case was reversed in the Exchequer Chamber, (*h*) after time taken for consideration, by the unanimous judgment of Tindal, C. J., Coltman, Erskine, and Maule, JJ., and Parke, Alderson, Gurney, and Rolfe, BB. The court stated the question to be distinctly "whether a statement or representation which is *false in fact, but not known to be so by the party making it*, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action." The court held, that on the whole current of authority, "*fraud must concur with the false statement in order to give a ground of action.*" The court explained the decision in *Humphrys v. Pratt*, (*g*) in which no reasons were assigned for the judgment, as having proceeded on the ground that the execution creditor in that case had made the sheriff his agent, and was bound to indemnify him for the consequences of acts done under the principal's instructions.

§ 689. The next case was *Ormrod v. Huth*, (*k*) in the Exchequer Chamber, in 1845, on error from the Exchequer of Pleas, so that the judges of the Queen's Bench must have taken part in the judgment. Tindal, C. J., laid down the rule, which he said was supported both by the early and later cases, so clearly as to render it unnecessary to review them, in the following words: "Where upon the sale of goods the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was *false to the knowledge of the party making it*, this would in general be *conclusive evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, *we think this does not amount to fraud in law.*"

§ 690. Finally the Queen's Bench abandoned their former doctrine

(*h*) 5 Q. B. 820.

(*k*) 14 M. & W. 650.

(*g*) 5 Bligh (N. S.) 154.

in express terms in 1846, Lord Denman, C. J., delivering the opinion in *Bailey v. Walford*, (l) in these words: *Bailey v. Walford.*

"The judgment which was given in this court in *Evans v. Collins*, 5 Q. B. 804, affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber, (5 Q. B. 829), * * * and we must admit the reasonableness of the doctrine there at length laid down."

The law thus settled has since remained unshaken, and in 1860 the Queen's Bench held that it was established by *Collins v. Evans*, and numerous other authorities, that "to support an action for false representation, the representation must *not only have been false in fact*, but *must also have been made fraudulently*." (m) 34

[And in *Dickson v. Reuter's Telegram Company*, (n) Bramwell, L. J., said: "The general rule of law is clear that no action is maintainable for a mere statement although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it." *Dickson v. Reuter's Telegram Co.*

§ 691. But the rule thus laid down is subject to the important qualification, to which reference has already been made, *ante*

§ 678. A person without knowing that he is stating that which is false, may take upon himself to state that as true as to which he is ignorant, whether it be true or false, and he will then incur, in the event of the statement proving to be false, whatever may be his guilt *in foro conscientie*, (o) the same legal responsibility as though he had made the statement with a knowledge of its falsity. An honest and well-grounded belief in the truth of that which is stated affords the only claim to protection, and the absence of any reasonable grounds for such a belief will guide the

Qualification of the rule.

Reckless statements.

(l) 9 Q. B. 197.

(m) *Childers v. Wooler*, 2 E. & E. 287, and 29 L. J., Q. B. 129. See, also, judgment of Lord Campbell, in *Wilde v. Gibson*, 1 H. L. C. 633.

34. See *ante* note 32.

(n) 3 C. P. D. 1, 5, C. A.

(o) It is this distinction between the moral complexion and the legal conse-

quences of a statement that has given rise to the unfortunate expressions "legal fraud" or "constructive fraud," expressions which were denounced by Bramwell, L. J., in *Weir v. Bell*, 3 Ex. D., at p. 343. "I do not understand legal fraud. It has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded com-

court to the conclusion that the belief was never honestly entertained. These reckless statements may be made either in willful ignorance of their truth or falsity, or may be due to forgetfulness of that which it is a man's duty to remember. (p) In either case the same consequences will result to the person making them. The court will not enter into any question as to the state of a man's mind, if it be proved that the statement was untrue to his knowledge. (q) 35

§ 692. In *The Western Bank of Scotland v. Addie*, (r) the charge to the jury was, that "if the directors took upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves,

*Western Bank
of Scotland v.
Addie.*

plaint of legal fraud, or anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty."

(p) *Burrowes v. Lock*, 10 Vesey 470; *Slim v. Croucher*, 1 De G., F. & J. 518. From an early period equity exercised a concurrent jurisdiction in cases of false representation, and entertained suits which were analogous to the common law actions of deceit. *Evans v. Bicknell*, 6 Vesey 173, per Lord Eldon; *Ramshire v. Bolton*, 8 Eq. 294. It seems clear that equity applied the same principles to such suits as were applied at common law (see, per Lord Chelmsford, in *Peek v. Gurney*, L. R., 6 H. L., at p. 390; and per Cotton, L. J., in *Schroeder v. Mendl*, 37 L. T. (N. S.) 452, at p. 454); but the question is one of only historical interest since the judiciary acts.

(q) *Hine v. Campion*, 7 Ch. D. 344.

35. False Pretence of Knowledge. Reckless Statements.—A statement made with false pretence of knowledge is fraudulent if false. *Bower v. Fenn*, 90 Penna. 359; *Frenzel v. Miller*, 37 Ind. 1, 17; *Beebe v. Knapp*, 28 Mich. 53; *Fisher v. Mellen*, 103 Mass. 503; *Beach v. Beimis*, 107 Mass. 498; *Sims v. Eiland*,

57 Miss. 607; *Estell v. Myers*, 54 Miss. 174; *Smith v. Newton*, 59 Ga. 113; *Foard v. McComb*, 12 Bush 723; *McKown v. Furgason*, 47 Iowa 636; *Cotzhausen v. Simon*, 47 Wis. 103; *Cabot v. Christie*, 42 Vt. 121; *Marsh v. Falkner*, 40 N. Y. 569; *Meyer v. Amidon*, 45 N. Y. 169, 175; *Dunn v. Oldham*, 63 Mo. 181; *Dulaney v. Rogers*, 64 Mo. 201. Statements which are not true, and which the party makes recklessly, not knowing whether they are true or false, will warrant the avoidance of the contract if relied upon. See ante § 638, note 4. In *Fisher v. Mellen*, 103 Mass. 503, 506, Wells, J., said: "If to induce the purchaser, defendant stated, as of his own knowledge, material facts susceptible of knowledge, which were false, and plaintiff was thereby induced to purchase, defendant is liable notwithstanding he was himself misinformed." See *Blackman v. Johnson*, 35 Ala. 252; *Hammond v. Pennock*, 61 N. Y. 145, 151; *Allen v. Hart*, 72 Ill. 104; *Bower v. Fenn*, 90 Penna. 359; *Parmlee v. Adolph*, 28 Ohio St. 10, 21; *Sledge v. Scott*, 56 Ala. 202; *Einstein v. Marshall*, 58 Ala. 153. Such statements will warrant an action for deceit. *Meyer v. Amidon*, 23 Hun 553. "The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge." *Morton, J. in Litchfield v. Hutchinson*, 117 Mass. 195.

(r) L. R., 1 Sc. App. 145.

and which *they did not believe, or had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." In the House of Lords, the Lord Chancellor (Lord Chelmsford) approved this direction, saying: "Suppose a person makes an untrue statement which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested, except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." But Lord Cranworth thought this was going rather too far, and said: "I confess that my opinion was that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they *bona fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

§ 693. In *The Reese River Company v. Smith*, (s) it was said by Lord Cairns, that the settled rule of law was, "that if persons take upon themselves to make assertions as to which Reese River Co. v. Smith. they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." In this Lords Hatherley and Colonsay concurred.

[And in *Weir v. Bell*, (t) Cotton, L. J., stated it to be a well-established rule, that "in an action of deceit a defendant may be liable not only if he has made statements which he Weir v. Bell. knows to be false, but if he has made statements which in fact are untrue, recklessly: that is, *without any reasonable grounds for believing them to be true*, or under circumstances which show that he was careless whether they were in fact true or false."

(s) L. R., 4 H. L. 64.

(t) 3 Ex. D. 238, C. A., at p. 242.

This statement of the law confirms the opinion of Lord Chelmsford in *The Western Bank of Scotland v. Addie* (*vide supra*), and accurately defines the principle which runs through numerous decisions. (*u*)

§ 694. Before leaving this branch of the subject, it is important to observe that all the following circumstances must concur in order to support an action of deceit:

1. The representation must be made to the plaintiff, or with the direct intent that it should be communicated to him, and that he should act upon it. ³⁶

2. It must be false in fact.

3. It must be false to the knowledge of the defendant, or made by him recklessly; that is to say, without reasonable grounds for believing it to be true or under circumstances which show that he was careless, whether it was in fact true or false. ³⁷

4. It must be a material one. ³⁸

5. The plaintiff must have acted upon the faith of it, and thereby suffered damage; and where the meaning of the representation is ambiguous, it is for the plaintiff to show that he understood it in the sense in which it is false. ³⁹

The above propositions are established by the cases already referred to, and by the two recent decisions of the Court of Appeal in *Arkwright v. Newbold* (*x*) and *Smith v. Chadwick*. (*y*) ⁴⁰

(*u*) *Rawlins v. Wickham*, 3 De G. & J. 304, 316; *Hart v. Swaine*, 7 Ch. D. 42; *Leddell v. McDougall*, 29 W. R. 403, C. A.; *Redgrave v. Hurd*, 20 Ch. D. 1, C. A., per Jessel, M. R., at p. 12; *Smith v. Chadwick*, Id. 27 *per eundem*, at p. 44, and per Cotton, L. J., at p. 68; *Mathias v. Yettis*, 46 L. T. (N. S.) 497, C. A. The rule had been laid down to the same effect by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777, at p. 786.

36. See *ante* § 643, note 11, and § 646, note 12.

37. See *ante* notes 32, 35. See Lord v. Goddard, 13 How. 198, 211; *Einstein v. Marshall*, 58 Ala. 153, 162; *Pike v. Fay*, 101 Mass. 134; *King v. Eagle Mills*, 10 Allen 548; *Dilworth v. Bradner*, 85 Penna. 238; *Bokee v. Walker*, 14

Penna. 139; *Milton v. Oldham*, 63 Mo. 181; *Dulaney v. Rogers*, 64 Mo. 201.

38. See *ante* § 639, note 5.

39. See *ante* § 637, note 3, and § 639, note 5.

(*x*) 17 Ch. D. 301, C. A.

(*y*) 20 Ch. D. 27, C. A.

40. Action for Deceit.—A third person may be held liable for misrepresentations which would not be actionable if uttered by a party to the contract. Thus in *Medbury v. Watson*, 6 Metc. 246, 260, Hubbard, J., said that the distinction was marked between false representations as to value of property by vendor to vendee, and those by a third person. "In the one, the buyer is aware of his position; he is dealing with the owner whose interest it is to put a high estimate

§ 695. So much with regard to the action of deceit. As to the buyer's right to rescind a contract induced by false representation, the principles adopted and applied by courts of equity had, before the judicature act, a much wider scope than those of the common law. At common law, except in the case of an innocent misrepresentation affecting the substance of the contract, (z) the buyer's right to rescind was governed by the same considerations as would have entitled him to maintain an action of deceit, but it seems clear that to obtain relief in equity it was sufficient for the buyer to prove that the representation was a material one inducing the contract, and was *false in fact*. (a) 41 As we have already stated (*ante* §§ 674, 675,) relief was only granted

Rescission of contract.

Difference between the principles of common law and equity.

upon his estate; in the other the man who makes the false assertions has apparently no object to gain. In the present case we think the averments would not have supported an action if the false representations had been made by the vendor. But they were made by a third person apparently disinterested, who proposed to aid plaintiffs and procure the estate for them for a price which he stated he knew that it cost, and which he affirmed that it was worth. Such representations made by a third person with intent to defraud, we hold are actionable."

Does an Action for Deceit Affirm the Sale.—It was assumed in *Kimball v. Cunningham*, 4 Mass. 502, that bringing an action for damages for deceit in making a sale was an affirmation of the sale. See, also, *Bacon v. Brown*, 4 Bibb 91. But it is evident that such an action is not necessarily an affirmation. If the amount of damages claimed is the difference between the value of the property as represented and as it proved, in such case the suit would be an affirmation. But if the buyer should tender back the property received by him, he might recover back the entire amount of the price, with damages for the deceit, on the theory that the contract had been avoided. *Hubbell v. Meigs*, 50 N. Y. 480, 487; *Miller v. Barber*, 66 N. Y. 558, 564; *Hersey v. Bene-*

dict, 15 Hun 282, 288. In this case *Talcott, P. J.*, said: "We see no reason why a vendor having disaffirmed the sale may not reclaim such of the goods as are within his reach, and when some have been placed beyond his reach, sue the vendee for the fraud." See *Lennox v. Fuller*, 39 Mich. 268. In *Emma Co. (Lim.) v. Emma Co.*, 7 Fed. Reporter 401, 420, the subject is fully discussed, and it was there held that an action of deceit against the agent of the other party was not inconsistent with an avoidance of the sale. See *Dayton v. Monroe*, 47 Mich. 193, where a suit joining counts for deceit and conversion was held good.

(a) *Ante* § 614.

(α) *Rawlins v. Wickham*, 3 De G. & J. 304; *Leather v. Simpson*, 11 Eq. 398-406, per *Malins, V. C.*; *Hart v. Swaine*, 7 Ch. D. 42; *Schroeder v. Mendl*, 37 L. T. (N. S.) 452, per *Cotton, L. J.*, at p. 454; *Redgrave v. Hurd*, 20 Ch. D. 1, C. A.

41. See *Einstein v. Marshall*, 58 Ala. 153, where the distinction is clearly drawn between misrepresentations such as will avoid a sale, which may be innocent, and such as will sustain an action for deceit, which must be fraudulent. *Sledge v. Scott*, 56 Ala. 202. See *ante* § 638, note 4; *Bower v. Fenn*, 90 Penna. 359; *Loper v. Robinson*, 54 Tex. 511.

bell, also, in *Wheulton v. Hardisty*, (*h*) said, "As to *Cornfoot v. Fowke*, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether that case was well decided by the majority of the judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favor of the dissentient Chief Baron."

And in *Barwick v. The English Joint Stock Bank*, (*g*) Willes, J., said, "I should be sorry to have it supposed that *Cornfoot v. Fowke* turned upon anything but a point of pleading."

§ 698. [In *Ludgater v. Love*, (*h*) the defendant's son, acting as the defendant's agent, had innocently represented that certain sheep which he sold to the plaintiff were sound. The ^{Ludgater v. Love.} defendant had previously *instructed* his son to represent that the sheep were sound, *knowing* that they were in fact affected with disease, but fraudulently withholding from his son knowledge of the truth. Held, by the Court of Appeal, following the *dicta* of the judges (Rolfe, Alderson, and Parke, BB.) in *Cornfoot v. Fowke*, (*i*) that the defendant was liable in an action for damages for the fraudulent misrepresentation.

Lord Selborne cited at length (at p. 697) the observations of Lord St. Leonards in the *National Exchange Company v. Drew*, (*j*) and pointed out that the case under consideration was identical with the one there suggested by that learned Lord.] ⁴²

§ 699. The subject was much discussed in *Udell v. Atherton*, (*k*) which, it is submitted, has been misunderstood to some extent. (*l*) The facts were these: The defendant's traveler ^{Udell v. Atherton.} sold a log of mahogany to the plaintiff, and warranted it sound, without authority, and *knowing that it was defective*. The buyers gave two bills of exchange for the price, at four and six months. The first bill was paid; before the maturity of the second bill, the plaintiff, who had been in possession of the log from the time of the sale, ordered it to be cut up, and then discovered that there was a defect, which reduced its value one-half. This defect was patent on inspection, for it

(*h*) 8 E. & B. 270; 26 L. J., Q. B. Rev. 430, criticising in turn the criticism of Redfield, C. J., in *Fitzsimmons v. Joslin*, 21 Vt. 129, upon *Cornfoot v. Fowke*.

(*g*) L. R., 2 Ex. 259; 36 L. J., Ex. 147. (*k*) 7 H. & N. 172; 30 L. J., Ex. 337.

(*h*) 44 L. T. (N. S.) 694, C. A.

(*i*) 6 M. & W. 358.

(*j*) 2 Macq. 103, at p. 145.

42. See an able discussion in 3 Am. L. (8th ed.)

had been pointed out to the traveler on a previous occasion, when he attempted to sell the log to another person. The defendant was wholly innocent, knowing nothing either of the defect, or of the fraudulent representation of the traveler. The purchaser, on the defendant's refusal to make an allowance, brought an action *for deceit*. The court was equally divided, Pollock, C. B., and Wilde, B., holding the action to be maintainable, and Bramwell and Martin, BB., holding the contrary. But the two last-named judges dissented solely on the ground that the defendant was not liable *in that form of action*: and Martin, B., very distinctly admitted that the buyer would have had the right to *rescind the contract*, on the ground of fraud committed by the agent, if the plaintiff had not deprived himself of this remedy, by cutting up and using the log, so that he could not restore it. All the judges were of opinion that the fraud of the agent would affect the validity of the contract, but Martin, B., pointed out, as the true distinction, that "in an action *upon the contract*, the representation of the agent is the representation of the principal, but in an *action on the case for deceit*, the misrepresentation or concealment must be proved against the principal."

§ 700. In the year 1867, two decisions, apparently not reconcilable, were rendered at about the same time by appellate courts, each being ignorant of the case pending in the other.

In *Barwick v. The English Joint Stock Bank*, (m) the case was argued in the Exchequer Chamber on the 8th of February, and the judgment rendered on the 18th of May by Willes, J., in behalf of himself and Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.

In *The Western Bank of Scotland v. Addie*, (n) the case was argued in the House of Lords in the beginning of March, and judgment was rendered on the 20th of May, just two days after the decision in the Exchequer Chamber.

In *Barwick v. The English Joint Stock Bank*, the fraud was committed by the manager of the defendant's bank acting in the course of his business, and the third count in the declaration was for fraud and deceit by the defendants, to which they pleaded not guilty. Held, that the fraud committed by the manager was properly charged in the declaration, as the

(m) L. R., 2 Ex. 259; 36 L. J., Ex. 147. (n) L. R., 1 Sc. App. 146.

fraud of the defendants, and that the defendants were liable for the fraud of their agents. The fraud committed was the giving of a guaranty by the manager in behalf of the bank, *he* knowing and intending that the guaranty should be unavailing, and fraudulently concealing from the plaintiff the facts which would make it so.

§ 701. Willes, J., in delivering the judgment (at p. 265) declared that in so deciding, "we conceive that we are in no respect overruling the opinions of my brothers Martin and Bramwell in *Udell v. Atherton*, (o) the case most relied on for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, a question which was settled as early as Lord Holt's time (*Hern v. Nichols*, 1 Salk. 289), but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers, having been an act adopted by them under peculiar circumstances, and the author of that act not being their *general* agent in business as the manager of a bank is."

Judgment of
Willes, J.

As to the distinction here pointed out between the responsibility of the principal for the fraud of an agent employed to effect *one* sale, and that of an agent to do business *generally*, it is not easy to appreciate how the principle can differ in the two cases, if in each, the agent is acting in the business for which he was employed by the principal: but the observation of the learned judge on this point is of course no part of the decision in the cause.

§ 702. [In that part of his judgment which immediately follows the foregoing passage, Willes, J., lays down some general principles of law which have been fully recognized in subsequent cases. He continues: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, *no sensible distinction can be drawn between the case of fraud and the case of any other wrong.* The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master

Principal answerable for the fraud of his agent committed in the course of his master's business and for his benefit.

(o) 7 H. & N. 172; 30 L. J., Ex. 337.

be proved;" and then, after illustrating the application of the principle to various cases, he adds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. *It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.*"

These principles have been expressly adopted in a subsequent series of cases including the two recent decisions of the Judicial Committee of the Privy Council in *Mackay v. The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; and in *Swire v. Francis*, 3 App. Cas. 106; and by Lord Selborne in *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, *post* § 707.

And in *Weir v. Bell* (p) Bramwell, L. J., while considering the reasoning of Mr. Justice Willes unsatisfactory, on the ground that there is an obvious distinction between fraud and any other tort, viz., that fraud is willful, and a master, as a rule, is not liable for the willful wrong of his servant, yet considered that the rule laid down was a useful one and that the case might be supported on another ground, viz., that any person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given.

The principles, therefore, laid down by Willes, J., may now be taken to be the recognized law upon the subject.]

§ 703. On the other hand, in *The Western Bank of Scotland v. Addie*, (q) at the close of the argument on the 12th of March, the Lords intimated that "as the decisions conflicted, they would take time to consider the case, *with a view to the laying down of some general rules,*" and it was not till the 20th of May that the decision was given.

The Western Bank of Scotland v. Addie.

The plaintiff's action was based on the allegation that he had been induced to buy *from the company* a number of its shares, by the fraudulent representations of its *agents, the directors*. The demand, according to the forms of the Scotch law, was in the alternative for a *restitutio in integrum*, or for damages. The principles governing the case were laid down by the Lord Chancellor (Lord Chelmsford), and by Lord Cranworth, in entire conformity with the opinion of Martin, B., in *Udell v. Atherton*. Lord Chelmsford said: "The distinction to be

(p) 3 Ex. D. 238, C. A., at p. 244.

(q) L. R., 1 Sc. App. 146.

drawn from the authorities, and which is sanctioned by sound principle, appears to be this:—where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to *enforce that contract*, or the person who has been deceived institutes a suit against the company to *rescind the contract* on the ground of fraud, the misrepresentations are *imputable to the company*, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers to *bring an action for damages for the deceit*, *such an action cannot be maintained against the company, but only against the directors personally.* * * *

“It may seem a hardship on the pursuer that he should be compelled to keep the shares, because, in ignorance of the fraud practiced on him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares, he may still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible.”

§ 704. Lord Cranworth first concurred in deciding that the plaintiff had lost his right to rescind the contract, because he was unable to put the adverse parties in the same situation in which they stood when the contract was entered into. On the other point, his Lordship said: “The appellants *are not the persons who were guilty of the fraud.* * * * An incorporated company cannot in its corporate character be called on to answer *in an action for deceit*. But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed from what I said when the case of *Ranger v. Great Western Railway Company* (r) was decided in this House, I meant to give as my opinion that the company could in that case have been made to *answer as for a tort in an action for deceit*, I can only say I had no such meaning. * * * In what I said, I merely wished to guard against its being supposed that I assented to the argument, that there would be *no means of reaching the company*,

(r) 5 H. L. C. 72.

if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed any opinion.

"An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents *to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers, by imparting to them the misconduct of those whom they have employed.* A person defrauded by *directors*, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, *must seek his remedy against the directors personally.*" The plaintiff was therefore held not entitled to recover on either ground. 43

§ 705. It is submitted that this being the tribunal of the last resort, this case must be considered as settling conclusively, that where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may—

Principles established in cases where a buyer has been defrauded by agent of vendor.

1st. Rescind the contract, if he can return the thing bought in the condition in which he received it, but not otherwise: or he may

Rights of buyer.

2dly. Maintain an action for deceit against the agent personally, but

3dly. Cannot maintain that, or any action in tort, against the innocent principal.

Further, that though he would have a claim against the principal for a return of the price to the extent to which the latter has profited by the fraud of his agent, his remedy would be in equity; for it was admitted on all sides, in *Udell v. Atherton*, that if the action for deceit would not lie, the purchaser

Further remedy in equity.

43. The language of Lord Chelmsford and of Lord Cranworth, above quoted, was approved in New Jersey Supreme Court, and applied there to a case where, as was claimed, the agent of the vendor had been guilty of deceit of which his principal was innocent. The buyer sued the principal for deceit. Beasley, C. J., said: "In such a juncture the aggrieved vendee has, at law, two and only two reme-

dies, the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent founded on the deceit. But in such a posture of affairs a suit based on the fraud will not lie against the innocent vendor on account of the deceit practiced without his authority or knowledge by the agent." *Kennedy v. McKay*, 43 N. J. L. 288. But see post note 44.

was remediless at law, when not in a condition to sue for a rescission, there being no form of action at law applicable to the case.

§ 706. [It is necessary to reconsider the 3d principle above laid down in the light of more recent decisions.

3d principle
reconsidered.

In *Swift v. Winterbotham*, (s) decided in 1873, the Court of Queen's Bench (Cockburn, C. J., and Quain, J.) following *Barwick v. The English Joint Stock Bank*, held the Gloucestershire Banking Company liable for the false representation of its manager, made in the course of conducting the business of the bank.

Swift v. Win-
terbotham.

In *Mackay v. The Commercial Bank of New Brunswick*, (t) decided in 1874, one Sancton, the cashier of the defendant bank, *whose duty it was to obtain the acceptance of bills in which the bank was interested*, sent a telegram to the plain-

Mackay v. The
Commercial
Bank of New
Brunswick.

tiffs whereby he falsely, but without the knowledge of the president and directors of the bank, made a representation to the plaintiffs, which, by omitting a material fact, misled them, and induced them to accept certain bills in which the bank was interested, which bills the plaintiffs had to pay, and *of which the defendant bank obtained the benefit*, and it was held, contrary to the *dicta* of Lords Chelmsford and Cranworth in the case of *The Western Bank of Scotland v. Addie*, that the bank was liable in an action of deceit, the false representation having been made by Sancton within the scope of his authority and for the benefit of the bank, and they having profited by it.

Their Lordships, however, refrained from stating what their decision would have been—

- (1) If the plaintiffs had not proved that the bank had profited by the fraud of their agent ;
- (2) If they had not proved the representations of Sancton to have been made within the scope of his authority, but had proved that the defendants accepted the benefit of it with notice of the fraud.

§ 707. In *Houldsworth v. The City of Glasgow Bank and Liquidators*, decided in 1880, (u) the plaintiff had bought from The City of Glasgow Bank, a copartnership registered with unlimited liability under the companies act, 1862, £4000 of its stock in 1877. He was registered as a part-

Action of de-
ceit against a
company by a
shareholder in
it not main-
tainable.

(s) L. R., 8 Q. B. 244, overruled in *Per Coleridge, C. J., at p. 312*.
Ex. Ch., L. R., 9 Q. B. 301, (*sub nom.*) (t) L. R., 5 P. C. 394.
Swift v. Jewsbury upon another point, (u) 5 App. Cas. 317.
without impugning the general doctrine.

Houldsworth v. The City of Glasgow Bank. ner, received dividends, and acted as a partner until the liquidation. In October, 1878, the bank went into liquidation, and the plaintiff was entered on the list of contributories and paid calls. In December, 1878, he brought this action, in the nature of an action of deceit, against the bank and its liquidators to recover damages in respect of the sum he had paid for the stock, the money he had already paid for calls, and the estimated amount of future calls. He founded his claim to relief on the ground that he was induced to buy the stock by reason of the fraudulent misrepresentations and concealments of the manager and directors. He admitted that after the winding up had commenced it was too late for him to claim rescission of his contract and *restitutio in integrum*. It was held by the House of Lords that the action was irrelevant and not maintainable. The distinction between shares in a company and any other chattels, viz., that a shareholder in a company is a partner in it, was pointed out, and it was shown that any attempt, while he remains a partner in the company, to throw upon the assets of the company and the other contributories the loss he had sustained, was at variance with the contract he had entered into with his partners, viz., that the assets and contributions shall be applied in payment of the debts and liabilities of the company, which contract he had, by remaining in the company until its liquidation, chosen to affirm. The decision in *The Western Bank of Scotland v. Addie* was approved and followed. But, on the question whether a corporation can be called on to answer in an action of deceit by a person other than a shareholder, the reader is referred to the judgments of Lord Selborne (x) and Lord Blackburn, (y) where the previous cases are discussed, particularly *Barwick v. The English Joint Stock Bank*, *The Western Bank of Scotland v. Addie*, and *Mackay v. The Commercial Bank of New Brunswick*.

§ 708. Lord Selborne, (x) adopts the principle laid down by Mr. Justice Willes in the first of those cases, and adds, "That principle received full recognition from this House in *The National Exchange Co. v. Drew* (z) and *New Brunswick Railway Co. v. Conybeare*, (a) and was certainly not meant to be called in question by either of the learned Lords who decided *The Western Bank of Scotland v. Addie*. It is a principle not of the law of torts or of fraud or deceit, but of the law of agency, *equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an indi-*

(x) 5 App. Cas. 826.

(y) At p. 338.

(z) 2 Macq. 103.

(a) 9 H. L. C. 711.

vidual, and the decision in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's* case) "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." And Lord Blackburn, (*b*) points out that Lord Chelmsford in *The Western Bank of Scotland v. Addie*, laid down no general position as to all contracts, and that his *dicta* and those of Lord Cranworth (who *does* use language applicable to all contracts) are reconcilable with *Barwick's* and *Mackay's* cases, if confined to the particular and peculiar contract then under consideration, viz., a contract to take shares, adding, in conclusion, (*c*) "I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is that if such a case arises, the consideration of the question whether it is decided by *Addie v. The Western Bank* is not meant to be prejudiced by anything I now say."

§ 709. The combined effect of the decisions in *The Western Bank of Scotland v. Addie* and *Houldsworth v. The City of Glasgow Bank*, is that the only remedy of a shareholder Effect of the decisions. in a joint stock company, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum*. If he is once debarred from seeking that relief by the declared insolvency of the company or from any other cause, there is no other remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud.

It is submitted, therefore, that the 3d proposition above laid down (*ante* § 705) must be modified thus :

3dly. The purchaser can maintain an action of deceit against the innocent principal, where the fraud of the agent has been committed within the scope of his authority, and where the principal has benefited by it. (*d*)

4thly. In this respect it makes no difference whether the principal be a corporation or an individual. (*e*) 44

(*b*) 5 App. Cas. 339.

(*c*) At p. 341.

(*d*) *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259; *Mackay v. The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; per Fry, J., in *Cargill v. Bower*, 10 Ch. D., at p. 514.

(*e*) *Mackay v. The Commercial Bank of New Brunswick*, *ubi supra*; *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, per Lord Selborne, at p. 326, and the more guarded remarks of Lord Blackburn, at pp. 339, 340.

44. Liability of Principal for Deceit

5thly. A shareholder in a joint stock company, who has been induced to purchase his shares by the fraud of the agent of the company, cannot bring an action of deceit against the company, so long as he is a member of it.](f)

§ 710. [In several cases, where shareholders in a company have endeavored to render the directors of the company liable for false and fraudulent representations contained in prospectuses or other documents, it has become necessary to

Liability of
the director of
a company
for false and
fraudulent

of Agent.—The general rule determining the liability of the principal for the torts of his agent is stated by the United States Supreme Court as follows: "Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal." Washington, J., in *American Fur Co. v. United States*, 2 Peters 358, 363. This rule was taken from the earlier case of *United States v. Gooding*, 12 Wheat. 460, 469, where Story, J., said: "Whatever the agent does within the scope of his authority binds his principal and is deemed his act," and it has since been approved in the same court in several cases. See *Barreda v. Silsbee*, 21 How. 146, 164; *Cliquot's Champagne*, 3 Wall. 114, 140; *Stockwell v. United States*, 18 Wall. 531, 550. A principal adopting a contract is bound by his agent's representations in effecting it, though false and in excess of his authority. *Mundorff v. Wickersham*, 63 Penna. 87; *Keough v. Leslie*, 92 Penna. 424; *Veazie v. Williams*, 8 How. 184, 187; *Crump v. United States Mining Co.*, 7 Gratt. 352, 369. In *Coddington v. Goddard*, 16 Gray 436, 441, the agent, in buying copper, being asked by the seller whether there had been any advance in copper, answered, truthfully, "none that I know of." There had been an advance to the knowledge of the principal, and the seller claimed to rescind. But the court said that such a representation was not made by him in behalf of the principal, but only as to his

personal knowledge, and therefore no fraud could be imputed to the principal. The knowledge of the agent is imputed to the principal. *The Distilled Spirits*, 11 Wall. 356; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 230. But see, *contra*, *Houseman v. The Building Association*, 81 Penna. 256. The liability of the principal for the deceit of his agent, acting in the course of his employment, has been asserted in the following cases: *Sandford v. Handy*, 23 Wend. 260, 268; *Bennett v. Judson*, 21 N. Y. 238, (modified in *Wakeman v. Dalley*, 51 N. Y. 27); *Griswold v. Haven*, 25 N. Y. 595; *Craig v. Ward*, 3 Keys 387; *Elwell v. Chamberlain*, 31 N. Y. 611, 619; *Davis v. Bemis*, 40 N. Y. 453; *Indianapolis, &c., Railway Co. v. Tyng*, 63 N. Y. 653, 655; *McBean v. Fox*, 1 Bradw. 177, 185; *Durant v. Rogers*, 87 Ill. 508, 511; *Reed v. Peterson*, 91 Ill. 288, 298; *Haskit v. Elliott*, 58 Ind. 493; *Locke v. Stearns*, 1 Metc. 560; *Commonwealth v. Nichols*, 10 Metc. 259; *Coddington v. Goddard*, 16 Gray 436, 441; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Tagg v. Tennessee National Bank*, 9 Heisk. 479; *Crump v. United States Mining Co.*, 7 Gratt. 352, 369; *Lawrence v. Hand*, 21 Miss. 103; *Law v. Grant*, 37 Wis. 548, 557; *Linton v. Housk*, 4 Kan. 535; *Tome v. Parkersburg Branch R. R.*, 39 Md. 36, 71, 85; *Lamm v. Port Deposit Association*, 49 Md. 233, 241; *Erb v. Great Western Railway Co.*, 3 Ont. App. 446.

(f) *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 146; *Houldsworth*

consider the relationship existing between the directors and the persons who have actually committed the fraud. In *Peek v. Gurney*, (g) where the action was brought by a shareholder against the directors of Overend, Gurney & Co., for false and fraudulent representations contained in the prospectus of the company intended to carry on the business of the firm of Overend & Gurney, it was attempted on behalf of Barclay, one of the defendant directors, to relieve him from liability on the ground that he had taken no part in, and given no express authority for the preparation and publication of the fraudulent prospectus which, in fact, he had never read until after the company had stopped payment. But this defence was held unavailing, and Lord Chelmsford, in moving the judgment of the House of Lords, said (at p. 392), "The short answer to this defence is, that he was acquainted with all that the other directors knew; he consented to become a director, knowing that a prospectus would, as a matter of course, be issued: he signed the memorandum and articles of association referred to in the prospectus; and, upon receipt of the prospectus, he filled up and signed the form of application for shares, printed with and forming part of the prospectus. Can he, upon these facts, be heard to say that he did not authorize the prospectus, or sanction its publication?"

statements
contained in
prospectuses
or other docu-
ments.
Peek v.
Gurney.

§ 711. In *Weir v. Bell*, (h) the defendant directors had been authorized by the company to issue debentures. Afterwards, the directors at a board meeting authorized the secretary of the company to employ a firm of brokers to place the debentures. The secretary accordingly employed brokers on behalf of the company, who, without any express authority from the directors, issued a prospectus containing false and fraudulent statements, on the faith of which the plaintiff purchased debentures which proved to be worthless.

Weir v. Bell.

The action was brought against several of the directors in the first instance, and the judgment of the Exchequer Division was in favor of them all, proceeding upon the ground that the brokers were the agents of the company, and not of the directors, and disregarding the finding of the jury upon this head as contrary to the evidence. The plaintiff appealed only against the judgment in favor of the defendant Bell. It was held by the majority of the Court of Appeal, consisting

v. *The City of Glasgow Bank*, 5 App. Cas. 317.

(h) 3 Ex. D. 288, C. A.; S. C., *sub nom.* *Weir v. Barnett*, Id. 82.

(g) L. R., 6 H. L. 377.

of Cockburn, C. J., Bramwell and Brett, L.JJ., that on the facts disclosed, the defendant was not liable.

Cockburn, C. J., based his judgment, which received the concurrence of Brett, L. J., on the ground that the defendant Bell, although a party as director to the receipt of the money paid for the debentures, was not aware of the falsity of the statements contained in the prospectus, and derived no personal benefit from the money so received. (i)

Bramwell, L. J., based his judgment on the ground that the defendant Bell had been guilty of no moral fraud, and not being the principal of the brokers, could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus.

Cotton, L. J., on the other hand, delivered a powerful dissentient judgment, holding that the finding of the jury, that the brokers were the agents of the directors, was warranted by the evidence, that the brokers in preparing and issuing the prospectus discharged a part of the duty entrusted to the defendant as one of the directors by the resolution authorizing the issue of debentures, and that it was the defendant's *duty as director* to ascertain whether the statements in the prospectus were true or false; and he referred to the passage above cited from Lord Chelmsford's judgment in *Peek v. Gurney*, as confirming this view.

§ 712. And in *Cargill v. Bower*, (k) Fry, J., following the decision of the Exchequer Division in *Weir v. Bell*, in which the Court of Appeal had not then delivered their judgment, held that a director of a company is not liable for a fraud committed by his codirectors, or by any other agent of the company, "unless he has either expressly authorized, or tacitly permitted its commission;" and he reconciled this decision with the principle applied by the House of Lords to *Barclay's* case in *Peek v. Gurney*, on the ground that *Barclay* must be considered to have there impliedly authorized the commission of the fraud, inasmuch as he had given authority to his codirectors to issue a prospectus, although from his knowledge of the affairs of the firm of *Overend & Gurney*, he must have been aware that any prospectus would necessarily be fraudulent.] 45

(i) At p. 249 of the report, Cockburn, C. J., intimates that he would have held the defendant liable if, after knowledge of the fraud, he had derived benefit from it. This was one of the questions left open by the Judicial Committee of the Privy Council in *Mackay v. The Commercial Bank of New Brunswick*, ante § 706.

(k) 10 Ch. D. 502.

45. See *Wakeman v. Dalley*, 51 N. Y. 27; *Morgan v. Skiddy*, 62 N. Y. 319

§ 713. It must not be concluded from this review of the authorities that the purchaser, who has been induced by false representations to make the contract, is always without remedy because the vendor believed the statements to be true, and was innocent of any fraudulent intent. These cases only establish that the vendor has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on *tort*. But, in very many instances, a representation made by the vendor amounts in law to a *warranty*, and when this is the case, the purchaser has remedies on the *contract*, for breach of the warranty.⁴⁶ The rules of law by which to determine when a representation is a warranty, and what are the rights of the buyer for a breach of this warranty, when the representation is false, are treated *post* Book IV., Part II., Ch. I., on *Warranty*. The law as to the effect of innocent misrepresentation of law or of fact, has been discussed *ante* § 614, *et seq.*

A buyer may have a remedy for false representation by innocent vendor, when representation amounts to warranty.

§ 714. The case of *Feret v. Hill* (1) has been omitted in the foregoing review, in order not to interrupt the exposition of the point directly under discussion, but the case well deserves consideration. It was in its facts the converse of *Cornfoot v. Fowke*. The defendant Hill was the owner of a tenement, and the plaintiff sent an agent to him to give assurances of the plaintiff's good character and reputation, in order to induce the defendant to let the premises to the plaintiff. The agent was innocent, and was honest in his assurances of the plaintiff's good character, but in point of fact the plaintiff, who pretended that he wanted the premises for carrying on business as a perfumer, intended to convert them into a brothel. The plaintiff was let into possession and used the premises as a brothel, and the defendant discovering the fraud practiced on him, ejected the plaintiff forcibly from the apartments, after having given him a notice to quit, which he disregarded. The plaintiff then brought ejectment to recover possession of the apartments, and the jury found, first, that the plaintiff, at the time he entered into the agreement, intended to use the premises for a brothel; and secondly, that he had induced the defendant to enter into the agreement by *fraudulent misrepresentation as to his character, and as to the*

Feret v. Hill.

Converse of *Cornfoot v. Fowke.*

46. *Da Lee v. Blackburn*, 11 Kan. 190; *v. Henderson*, 64 Ala. 535; *Bower v. Weimer v. Clement*, 37 Penna. 147; *McFarland v. Wemmer*, 9 Watts 55; *Jackson v. Wetherall*, 7 S. & R. 422; *Wilcox*

Fenn, 90 Penna. 359.

(1) 15 C. B. 207; 23 L. J., C. P. 183.

purpose for which he wanted the premises. The verdict was for the defendant, and Crowder, J., reserved leave to the plaintiff to move to enter the verdict in his favor, if the court should be of opinion that the agreement, notwithstanding this finding, was valid. The motion prevailed, and the plaintiff was held entitled to enforce the agreement, on the ground that the misrepresentation was of a fact *collateral to the agreement*, Jervis, C. J., saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing, when in fact he was doing another." The other judges also put the case upon the ground that the court was not called on to enforce any agreement at all, but to replace premises in the possession of a man who had an executed legal title to the possession: that it was impossible to say that nothing passed under the demise, simply because it was obtained by fraudulent misrepresentation.

The effect of this decision seems to be, that a defrauded lessor, who has actually executed a demise, cannot treat it as a nullity, but must proceed to have it rescinded on the ground of the fraud by an appropriate tribunal, before treating it as non-existent: such appropriate tribunal not being a court of law, but one of equity.

[And now, under the judicature acts, when such relief is sought by the plaintiff, the Chancery Division of the High Court is the appropriate tribunal. Judicature Act, 1873, § 34, sube. 3, *ante* § 605.]

§ 715. In further illustration of the effect of fraudulent representations to the prejudice of the purchaser, the reader is referred to the series of decisions rendered in cases where shareholders in companies have attempted to relieve themselves from responsibility by showing that they had been induced to take the shares through fraudulent representations of the directors. These cases are all reviewed in *Oakes v. Turquand*, (*m*) decided in the House of Lords in August, 1867, in which it was settled that such contracts are voidable only, not void, and that the defrauded shareholders cannot relieve themselves from responsibility to creditors, by disaffirming the contract after the company has failed, and has been ordered to

(*m*) L. R., 2 H. L. 325. See, also, *Tennent v. The City of Glasgow Bank*, 4 App. Cas. 615, and *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, *ante* § 707; and *Burgess' case*, 49 L. J., Ch. 541.

be liquidated in chancery, [and the same principle applies to a voluntary winding-up. (n)] 47

§ 716. [By 30 and 31 Vict., c. 131, § 38, (Companies Act, 1867,) it is enacted, that "every prospectus of a company and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors, or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." (o)]

Companies act, 1867, § 38.

It would be beyond the scope of this work to examine all the cases which have been decided on the question what contracts must be set out under this section, as to which there has been a great divergence of opinion. The reader is referred to the note on this section in Mr. Buckley's work on the Companies Acts, (3d ed.,) p. 455.]

§ 717. It would be an onerous and scarcely useful task to enumerate the various devices which, in adjudicated cases, have been held by the courts to be frauds on purchasers. The principles stated in this chapter have been illustrated in

Devices which have been held fraudulent against buyer.

(n) *Stone v. City and County Bank*, 3 C. P. D. 282, C. A.

47. **Stock Subscriptions, Procured by Fraud.**—In *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 190, Runyon, C., said: "The rule is universal that whatever fraud creates, justice will destroy." Contracts to take stock stand on the same footing as other obligations, and may be rescinded for fraud. *Thompson on Liability of Stockholders*, § 142. But where the company has become insolvent, and creditors' rights have intervened, the shareholder cannot be relieved from his subscription. *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Upton v. Trebilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 667; *Pullman v. Upton*, 96 U. S. 328; *Hawley v. Upton*, 102 U. S. 314; *County of Morgan v. Allen*, 103 U. S. 498, 509. See *ante* §

707. But a shareholder whose stock was issued without authority of law, and is therefore void, cannot be held liable either to the company or its creditors on such subscription. *Scovill v. Thayer*, 105 U. S. 143, 149.

(o) *Cornell v. Hay*, L. R., 8 C. P. 328; *Askew's case*, 22 W. R. 762; *Charlton v. Hay*, 31 L. T., (N. S.) 437; 23 W. R. 129; *Gover's case*, 1 Ch. D. 182, C. A.; *Craig v. Phillips*, 3 Ch. D. 722; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394, C. A.; *New Sombrero Co. v. Erlanger*, *id.* 73, C. A.; 3 App. Cas. 1218; *Bagnall v. Carlton*, 6 Ch. D. 130; S. C. in C. A., *id.* 371; *Twycross v. Grant*, 2 C. P. D. 469, C. A.; *Sullivan v. Mitcalfe*, 5 C. P. D. 455, C. A.; *Arkwright v. Newbold*, 17 Ch. D. 301, C. A.

numerous decisions. (p) Some of those which have most frequently occurred in practice will be presented as examples.

In *Bexwell v. Christie*, (q) it was held to be fraudulent in the vendor to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield also in that case held it to be a fraud on the public, and therefore on the buyer, for the vendor falsely to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor."

The foregoing case was highly eulogized, and followed by Lord Kenyon and the King's Bench in *Howard v. Castle*; (r) and the employment of "puffers" as they are termed, that is, persons engaged to bid in behalf of the vendor in order to force up the price against the public, has ever since been held fraudulent. (r) 48

(p) *Early v. Garret*, 9 B. & C. 928; *Baynard*, 2 Houst. 559; *McDowell v. Duke of Norfolk v. Worthy*, 1 Camp. 340; *Hill v. Gray*, 1 Stark. 434; *Jones v. Bowden*, 4 Taunt. 847; *Barber v. Morris*, 1 Mood. & R. 62; *Tapp v. Lee*, 3 B. & P. 867; *Corbett v. Brown*, 8 Bing. 83; *Hill v. Perrott*, 3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369.

(q) 1 Cowp. 395.

(r) 6 T. R. 642. See, also, *Wheeler v. Collier*, 1 M. & W. 123; *Crowder v. Austin*, 3 Bing. 368; *Rex v. Marsh*, 3 Y. & J. 381; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B. (N. S.) 204, and 32 L. J., C. P. 180.

48. **Puffing at an Auction Sale is Ground for its Avoidance.**—This was held in *Veazie v. Williams*, 8 How. 134, 153, although the by-bidding was by the auctioneer without authority from his principal. See *Moncrieff v. Goldsborough*, 4 Har. & McH. 281; *Pennock's Appeal*, 14 Penna. 446, 450; *Staines v. Shore*, 16 Penna. 200; *Yerkes v. Wilson*, 81 Penna. 9, 17; *Fisher v. Hersey*, 17 Hun 370; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Curtis v. Aspinwall*, 114 Mass. 187, 191; *Miller v.*

Baynard, 2 Houst. 559; *McDowell v. Simms*, 6 Ired. Eq. 278. But an open bidding for the owner, or an announcement of a limit below which the property will not be sold, is legitimate. *Steele v. Ellmaker*, 11 S. & R. 86, 88. This is said to be overruled in *Pennock's Appeal*, 14 Penna. 446, 450, but it is not apparent why. The cases are not inconsistent. The fact that a puffer bid at a sale will not impair its validity if the bid next preceding the successful bid was genuine. This was stated in *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159, 165, on the authority of *Story*; but in *Curtis v. Aspinwall*, 114 Mass. 187, 197, *Morton, J.*, said: "There is a presumption that the last bidders are influenced and injured by the previous fictitious bids. But this presumption may be rebutted. If the by-bidding had no effect or influence upon the purchaser's bid, the latter cannot avoid his contract." And the court reasoned that by-bidding on one of several adjoining parcels of land might mislead the judgment of buyers of other parcels.

§ 718. In the case of *Warlow v. Harrison*, decided in Queen's Bench, (s) and afterwards in the Exchequer Chamber, (t) the law on the subject of the auctioneer's responsibility in such cases was examined on the following state of facts: The defendant was an auctioneer, having a horse repository, and they advertised for sale a mare, "the property of a gentleman, *without reserve*." The plaintiff attended the sale, and bid 60 guineas, and another person bid 61 guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at 61 guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bona fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, 60 guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following: "*First*. The highest bidder to be the buyer, and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser. *Third*. The purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5s. in the pound on account of his purchase, and pay the remainder before such lot is delivered. *Eighth*. Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of £2 per cent." As the judgment of the Exchequer Chamber turned much upon the pleadings, it is necessary to state that the plaintiff's declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, "and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract*; and then charged a breach of the defendant's duty to the plaintiff *as the plaintiff's agent* in failing to complete the contract in behalf of the plaintiff. The defendant pleaded: *First*, not guilty. Secondly, that the plaintiff was not the highest bidder. Thirdly, that the defendant did not become the plaintiff's agent as alleged.

In the plaintiff's argument the following civil law authorities were cited: Cicero de Officiis, lib. 3, § 15, "*Tollendum est igitur ex rebus contrahendis anne mendacium; non licitorem venditor, nec qui contra*

Warlow v. Harrison.

Auctioneer responsible for fraud on buyer.

(s) 28 L. J., Q. B. 18.

(t) 1 E. & E. 295; 29 L. J., Q. B. 14.

se liceatur, (u) emptor apponet:” and Huberus lib. 18, tit. 2, §. 7, *Prælectiones*: “*Sed hoc facile constabit, si venditor falsum emptorem inde ab initio subornet, qui plus aliis offerat, ut veris emptoribus præmium maximæ licitationis, vulgo, stryckgelt, quo nihil usitatus, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia hoc est contra fidem conventionis perfectæ qua statutum est ut maximo licitatori præmium daretur.*”

§ 719. Lord Campbell, C. J., delivering the unanimous judgment of the Queen’s Bench, holding:

First.—That it was not true in point of law that the auctioneer is the agent of the purchaser until the acceptance of his bid as being the highest, which acceptance is shown by knocking down the hammer; and that till then the auctioneer is exclusively the agent of the vendor.

Secondly.—That both parties may retract till the hammer is knocked down: that no contract takes place between them till that is done; and that the auctioneer cannot be bound when both the vendor and bidder remain free.

The learned Chief Justice then said in the name of the court:

Thirdly.—“We are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down.”

§ 720. Although this judgment of the Queen’s Bench was not reversed in the Exchequer Chamber, because approved on the pleadings as they stood, the third proposition above quoted was not affirmed, and the Court of Error gave leave to the plaintiff to amend, so as to enforce a liability against the auctioneer. The Exchequer Chamber, composed of Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding the auctioneer liable, and in giving leave to amend; but Willes, J., and Bramwell, B., without dissenting from the opinion of the majority, as delivered by Martin, B., preferred putting their judgment on a different ground, on which they felt themselves more clearly justified in their conclusions. Martin, B., first declared that the judgment of the Queen’s Bench was right upon the pleadings, but that the Court of Appeal being now vested with power to amend, and the object of the law being to de-

(u) The better reading is, *qui contra relicentur*, “a person to bid back” or lower than some one has already bid, in order to produce the impression that the property is not worth what has been offered for it. The reading *se liceatur* is condemned by Zumpt.

termine the real question in controversy, the power ought to be "largely exercised" for that purpose; and that upon the facts the plaintiff was entitled to recover.

§ 721. The learned Baron then proceeded as follows: "In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be '*without reserve*.' This, according to all the cases both at law and in equity, means that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position, see the case of *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. *Denton v. The Great Northern Railway Company*, 5 E. & B. 860, 25 L. J., Q. B. 129. Upon the same principle it seems to us, *that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve*. We think that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that *this contract is made with the highest bona fide bidder, and in case of a breach of it, he has a right of action against the auctioneer*. * * * We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

Auctioneer in sale "without reserve" contracts with the highest bona fide bidder, that he shall become purchaser.

§ 722. In reference to the conditions of the sale, the learned Baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a

reason, that the sale was without reserve; and that the court were inclined to differ with the Queen's Bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that if the owner acted contrary to the conditions of the sale, he must pay the usual commissions. The court was therefore ready to give judgment for the plaintiff if he chose to amend his declaration.

Willes, J., and Bramwell, B., preferred putting their assent to the judgment on the grounds that the facts furnished strong evidence to show that the auctioneer had received no authority from the owner to advertise a sale "without reserve;" and that the plaintiff ought to be allowed to amend by adding a count, alleging an undertaking by the auctioneer that he had such authority, and a breach of that undertaking.

§ 723. It was said at one time that the rule in equity differs from that at common law on the subject of puffers to this extent: that in equity it is allowable to employ one puffer, but no more, for the purpose only of preventing the property from being sold below a limit fixed by the vendor.

Willes, J., in *Green v. Baverstock*, (t) however, expressed the opinion that the rule in equity was confined to sales under the order of the court, in conformity with "an inveterate practice." But the existence of any such rule in equity appears to have been still a moot point, even

in 1865, as is shown in the opinion of Lord Cranworth in *Mortimer v. Bell*. (u) By the new act, however, 30 and 31 Vict., c. 48, passed

Act 30 and 31
Vict., c. 48.

at the instance of Lord St. Leonards (but applicable only to sale of land), it is provided in the fourth section, that "whereas there is at present a conflict between her Majesty's courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled; and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, that from and after the passing of this act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

(t) 14 C. B. (N. S.) 204; 32 L. J., C. (u) 1 Ch. 10.
P. 180.

§ 724. The statute further directs that where land is stated to be sold without reserve, it shall not be lawful for the seller to bid, or the auctioneer to accept, a bid from him, or any one employed by him; and where the sale is subject to the right of a seller to bid, it shall be lawful for the seller or any *one* person in his behalf to bid. (x)

The act also forbids the courts of equity from continuing the practice of opening biddings in sales made under their orders; so that in future the highest *bona fide* bidder at such sales shall be the purchaser, in the absence of fraud or improper conduct in the management of the sale.

In a case (y) just before the passing of this act, it was announced that the sale was "without reserve," and that the parties interested had liberty to bid. It was held by Lords Justices Turner and Cairns that on these terms, a purchaser was bound by his bid for £19,000, the only bids higher than £14,000 having been made by the purchaser and a mortgagee in possession of the estate.

Dimmock v. Hallett.

§ 725. In *The Queen v. Kenrick*, (z) the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady deceased, were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable; all these statements being false, and the vendor knowing that nothing but a belief in their truth would induce the buyer to make the purchase.

Telling falsehoods to buyer about ownership of horses, and their qualities, and the reasons for selling them.

The Queen v. Kenrick.

In *Dobell v. Stevens*, (a) the fraud consisted in falsely telling the buyer that the receipts of a public house were £160 per month, and the quantity of porter sold seven butts per month, and that the tap was let for £82 per annum, and two rooms for £27 per annum, whereby the plaintiff was induced to buy; and similar deceits were employed in *Lysney v. Selby*, (b) and *Fuller v. Wilson*. (c) 49

False statement, exaggerating receipts of a public house.

Dobell v. Stevens

(x) See *Gilliat v. Gilliat*, 9 Eq. 60, as to the construction of this clause.

(y) *Dimmock v. Hallett*, 2 Ch. 21.

(z) 5 Q. B. 49.

(a) 3 B. & C. 623.

(b) 2 Lord Raymond 1118.

(c) 3 Q. B. 58.

49. *Cruess v. Fessler*, 39 Cal. 336; *Hale v. Philbrick*, 47 Iowa 217; *Mather v. Robinson*, 47 Iowa 403; *Nelson v. Wood*, 62 Ala. 175; *Crossland v. Hall*, 33 N. J. Eq. 111; *Bower v. Fenn*, 90 Penna. 359.

§ 726. In *Schneider v. Heath*, (d) a vessel was sold, "hull, masts, yards, standing and running rigging, *with all faults*, as they now lie." There was, however, a false statement, that "the hull was nearly as good as when launched," and means were taken to conceal the defects that the vendor knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser; but in *Baglehole v. Walters*, (e) Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale of a vessel under exactly the same description, "with all faults," where the seller, although knowing the latent defects, used no means for concealing them from the purchaser. In this decision, Lord Ellenborough expressly overruled *Mellish v. Motteux*, (f) and in *Pickering v. Dowson*, (g) the Common Pleas followed Lord Ellenborough's decision, as one "never questioned at the bar;" and concurred in overruling *Mellish v. Motteux*.

Baglehole v. Walters was also followed by the King's Bench in deciding *Bywater v. Richardson*, (h) in 1834. 50

§ 727. In *Horsfall v. Thomas*, (i) the defence to an action on a bill of exchange was that the buyer had been defrauded in the purchase of a steel gun, for which the bill was given. The gun was made by defendant's order, and he was informed when it was ready, but made no examination of it, and sent the bill of exchange in part payment. There was a defect in the gun, and a metal plug was inserted, which would have concealed the defect from any person inspecting the gun. It was received by the defendant, fired several times, answered the purpose as

(d) 3 Camp. 506.

(e) 3 Camp. 154.

(f) Peake 115.

(g) 4 Taunt. 779.

(h) 1 Ad. & E. 508. See, also, *Freeman v. Baker*, 5 B. & Ad. 797; *Ward v. Hobbs*, 4 App. Cas. 13; S. C., 3 Q. B. D. 150, C. A., overruling 2 Q. B. D. 331.

50. Sale with all Faults.—Notwithstanding the sale is "with all faults," the thing sold must answer the description by which it is sold. In *Whitney v. Boardman*, 118 Mass. 242, 247, the phrase is defined to mean "such faults or defects as the article sold might have, retaining

still its character and identity as the article described." See *Henshaw v. Robins*, 9 Metc. 83, 90; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, 334; *Hanson v. Edgerly*, 29 N. H. 343, 353. "When a vendee takes an article with all faults he becomes his own insurer, and the seller is relieved from all obligation to disclose any fault; but he must resort to no trick or contrivance to conceal the defect or mislead the purchaser." *Pearce v. Blackwell*, 12 Ired. L. 49, 61; *Smith v. Andrews*, 8 Ired. 6.

(i) 1 H. & C. 90, and 31 L. J., Ex. 322.

long as it was entire, but afterwards burst in consequence of the defect. Held, *that the defendant had not been influenced in his acceptance of the gun by the artifice used, for he had never examined it*: that the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of a defect which would make the gun worthless, and failed to inform him of it, was not a fraud. The learned judge, Bramwell, B., who delivered the judgment of the court, said that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true and which it is the duty of the party to make known." In the case before the court there was no affirmance; and there was no duty on the part of the maker to point out a defect where the buyer has an opportunity for inspection and does not choose to avail himself of it. (*k*)

This decision is questioned and disapproved by Cockburn, C. J., in *Smith v. Hughes*, L. R., 6 Q. B. 597, and it certainly seems that the artifice used to conceal the defect comes within the definition usually given of fraud.

§ 728. The case of *Hill v. Gray*, (*l*) decided by Lord Ellenborough at Nisi Prius in 1816, would seem to conflict with the general rule in relation to concealment. The facts were that the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was: the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant labored under this delusion, but did not remove it." The price was £1000, the picture being said to be a Claude, and proof was offered that it was genuine, and that after the defendant knew that it was not one of Sir Felix Agar's pictures he had objected to paying on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have led in a suspicion on the part of the purchaser which he

(*k*) See *Keates v. Earl Cadogan*, 10 C. v. *Gray*, 1 Stark. 434. B. 591, and 20 L. J., C. P. 76; also, *Hill* (*l*) 1 Stark. 434.

knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. * * * This case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point *which he thought material to influence his judgment.*" This judgment, on a first perusal, seems certainly not reconcilable with the received principles on the subject, but in *Keates v. Earl Cadogan*, (n) the case was explained by the Common Pleas by construing the language of Lord Ellenborough in the italicized passages as intimating that there "had been a positive aggressive deceit." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived, and did not remove.

§ 729. In the earlier case of *Jones v. Bowden*, (o) an action upon the case for deceit in a sale was maintained under the following circumstances: The defendant bought pimento at an auction sale, as sea-damaged. *It is usual in such sales of this article to declare it to be sea-damaged, and when nothing is said, it is supposed to be sound.* Defendant then repacked it, and it was included in a catalogue of the auction sale, as "187 bags pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36, Camomile street." Defendant drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea-damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition nor comment on what was stated in the catalogue, and the plaintiff became the purchaser at 13d. per pound, which was *not more than a reasonable price, after taking into consideration the fact that it had been sea-damaged and repacked.* The jury said: "That the state of the goods *ought* to have been communicated by the defendant to the plaintiff," and found a verdict for him, subject to the point whether the action was maintainable. A rule

Jones v. Bowden.

Where usage required damage to be declared.

(n) 10 C. B. 591, at p. 600; 20 L. J., C. P. 76. And see per Lord Chelmsford in *Peck v. Gurney*, L. R., 6 H. L., at p. 390, who doubts whether the mere silence of the agent could be so interpreted, but attributes the explanation to the anxiety of the court to reconcile the case with established principles.

(o) 4 Taunt. 847.

to set aside the verdict was discharged. The grounds are not very intelligibly given, but it may be fairly inferred from the language of Mansfield, C. J., that he considered the verdict of the jury as establishing a usage which imposed on the vendor the duty of disclosing the defect, thus bringing the case within the general principle stated by Bramwell, J., in *Horsfall v. Thomas*. (g)

§ 730. In *Smith v. Hughes*, (r) the action was by the plaintiff, a farmer, to recover the price of certain oats sold to the defendant, an owner and trainer of race-horses. The plaintiff's account of the transaction was that he took a sample of the oats to the defendant and asked if he wished to buy oats, to which the latter answered, "I am always a buyer of good oats." The plaintiff asked thirty-five shillings a quarter, and *left the sample* with the defendant, who was to give an answer next day. The defendant wrote to say he would take the oats at thirty-four shillings a quarter, and they were sent to him by the plaintiff. But the defendant's account was that, to the plaintiff's question he answered, "I am always a buyer of good *old* oats:" and that the plaintiff then said, "I have some good *old* oats for sale." There was no difference of testimony as to the other facts; and it was further sworn by the defendant that as soon as he discovered that the oats were new, he sent them back: that trainers use old oats for their horses, and never buy new when they can get old. There was also evidence to the effect that thirty-four shillings a quarter was a very high price for new oats, more than a prudent business man would have given, and that old oats were then very scarce.

§ 731. The judge told the jury that the question was whether the word "old" had been used in the bargain as stated by the defendant, and if so the verdict must be for him; but if they thought the word "old" had not been used, then the second question would be "whether the plaintiff believed the defendant to believe or to be under the impression that he was contracting for the purchase of old oats." If so, the verdict would also be for the defendant. The jury found for the defendant. The question for the Queen's Bench was whether the second direction to the jury was right, for they had not answered the questions separately, and it was not possible to say on which of the two grounds they had based their verdict. In testing the second question

(g) 1 H. & C. 90; 31 L. J., Ex. 322. of *Laidlaw v. Organ*, 2 Wheat. 178, before the Supreme Court of the United States. See, also, *Parkinson v. Lee*, 2 East 314.

(r) L. R., 6 Q. B. 597; and see the case

it was plainly necessary to assume that the word "old" had not been used, and on that assumption the court ordered a new trial.

Cockburn, C. J., said, that assuming the vendor to know that the buyer believed the oats to be old oats, but that he had done nothing directly or indirectly to bring about that belief, but simply offered his oats and exhibited his sample, the passive acquiescence of the vendor in the *self-deception* of the buyer did not entitle the latter to rescind the sale.

Blackburn, J., concurred, saying that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." The learned judge further doubted whether the jury had been made to understand the difference between agreeing to take the oats under the belief that they were old (for in that case there would be no defence), and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old, for in this case the parties would not be *ad idem* as to their bargain, and there would therefore be no contract.

Hannen, J., also thought that the second question was probably misunderstood by the jury, and concurred with Blackburn, J., in the distinction above pointed out. He said, that to justify a verdict for the defendant it was not enough for the jury to find that "the plaintiff believed the defendant to believe that he was buying old oats," but that what was necessary was, to find that "the plaintiff believed that the defendant believed that the plaintiff was *contracting* to sell old oats."

§ 732. In the following very exceptional case, where the fraud of the vendor was committed not on the buyer, but by collusion with the buyer against another person, the vendor was not permitted to recover against the buyer.

Fraud, by collusion between vendor and buyer against third person; vendor prevented from recovering against buyer.

Jackson v. Duchaise

In *Jackson v. Duchaise*, (s) the facts were that the plaintiff sold the goods in a house to the defendant for £100, but she could not raise the money; she applied to one Walsh, to aid her in the purchase, and he at her request agreed to buy them from the plaintiff for £70, which he did, taking a bill of sale to himself. By agreement between the plaintiff and the defendant, she was to pay the deficiency of £30 to him, in two notes, of £15 each, and this was concealed from Walsh. On action brought by plaintiff on one of the two notes, Lord Kenyon, at Nisi

(s) 3 T. R. 551.

Prius, and the court *in banc* afterwards, held the transaction to be a fraud on Walsh, and that plaintiff could not recover. The principle was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency, are held fraudulent and void. (t)

In the Supreme Court of the State of Vermont it was held to be fraudulent in a vendor to sell a horse having an internal malady of a secret and fatal character, not apparent by any external indications, but known to the seller, and known by him to be unknown to the buyer, if the malady was such as to render the horse of *no value*. (u) ⁵¹

Case decided in the Superior Court of Vermont—of fraud on buyer.

(t) *Dalgleish v. Tennent*, L. R., 2 Q. B. 49.

(u) *Paddock v. Strobridge*, 29 Vt. 470.

51. Concealment may be Fraudulent.—See *ante* § 640, notes 6, 7; § 641, notes 8, 9, and § 668, note 24; *Bank of United States v. Lee*, 13 Pet. 107, 119; *Cornelius v. Molloy*, 7 Penna. 293, 299; *Hanks v. McKee*, 2 Litt. 227. In *Krumbhaar v. Birch*, 83 Penna. 426, 428, *Mercur, J.*, said: "It needs no citation of authorities to prove that the willful misrepresentation or concealment of a material fact by the vendor constitutes a fraud." This was followed in *Croyle v. Moses*, 90 Penna. 250, where the same judge added that misrepresentations might be by art or artifice as well as by statements. In *Maynard v. Maynard*, 49 Vt. 297, the principle of *Paddock v. Strobridge*, stated in the text, was followed. The seller of a bull did not disclose his knowledge that the bull was impotent, though he knew that the buyer designed him for breeding purposes. This concealment was held actionable fraud. In the same state, in the case of *Paddock v. Strobridge*, 20 Vt. 470, 483, a horse sold was worthless because he had a secret disease, and the failure to disclose it was held fraudulent. *Redfield, C. J.*, said: "There is no positive duty on the vendor to disclose secret defects, but if he conceal them even by silence, when he knows that the other party has fallen into a delusion

in regard to them, this is equivalent to a false representation or the use of art to disguise the defects." *Carpenter v. Phillips*, 2 Houst. 524. See *Hanson v. Edgerly*, 29 N. H. 343, 359. In *Gough v. Dennis, Hill & D.* 55, the vendor offered a note of a broken bank for sale, and said that a certain broker had offered a certain price for it, but concealed the fact that three other brokers had refused it. This concealment was held fraudulent. See *Prentiss v. Russ*, 16 Me. 30. And in *Patterson v. Kirkland*, 34 Miss. 423, 431, the court said: "If defendant [the seller] made representations as to soundness, he was bound to state all he knew on the subject." See *Atwood v. Chapman*, 68 Me. 34, 40; *Blydenburgh v. Welsh*, Baldw. 331. In contrast with the Vermont decisions above stated is the case of *Beninger v. Corwin*, 24 N. J. L. 257, 264, where a horse apparently sound was wind-broken. *Ogden, J.*, said: "The seller may know of defects in his goods, and yet if he makes no false representations, employs no artifice to conceal them, is guilty of no positive deceit, and leaves the buyer to exercise his own judgment, skill and experience upon the qualities of the subject of sale, whatever ought to be the effect upon the transaction, on moral grounds, of such silence, he is not, according to the cases, guilty of legal active fraud." This accords with the weight of authority. But any artifice to conceal is

SECTION IV.—FRAUD ON CREDITORS—STATUTE OF ELIZABETH.

§ 733. Sales made by debtors in fraud of creditors are usually considered as being governed by the statute 13 Eliz., c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in *Cadogan v. Kennett*, (x) Lord Mansfield said that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes, 13 Eliz., c. 5, and 27 Eliz., c. 4. The former of these statutes relates to creditors only: the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud." 52

The 13 Eliz., c. 5, was intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, *alienations*, &c., &c., as well of lands and tenements, as of *goods and chattels* * * * devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to *delay, hinder, or defraud creditors* * * * to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The statute, therefore, provides that all alienations, bargains, and conveyances of lands and tenements, or goods and chattels, made for any such intent and purpose as is above expressed, shall be "deemed and taken, (only against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of none effect." This statute was confirmed by 14 Eliz., c. 11, § 1, and made perpetual by 29 Eliz., c. 5, §

fraudulent, and so where a horse had been drugged at the time of the sale to conceal the disease, the sale was held voidable. *Cassell v. Herron*, 5 Clark 250. See *ante* § 641, note 9.

(x) Cowp. 432.

52. Statutes have been passed in many

of the states determining the effect of the retention of possession by the seller after the sale. In some states such continued possession renders the sale void as to third persons. In others it is made *prima facie* void, and good faith may be shown. See *post* notes 58, 60.

2. And it *seems* that it protects against fraudulent sales, ^{*Seems, pro-*} subsequent creditors, as well as those having claims at the ^{*teots future*} date of the fraudulent conveyance. (y) 53 ^{*creditors.*}

(y) *Graham v. Furber*, 14 C. B. 410, and 23 L. J., C. P. 51. It is now settled that subsequent creditors may, under certain circumstances, maintain an action to set aside a fraudulent conveyance, and are in any case entitled to share in the benefit of proceedings taken by creditors having claims at the date of the conveyance. The cases are collected in *Robson on Bankruptcy*, p. 153 (ed. 1881.)

53. Persons having Actions for Tort against the Seller, are his Creditors within this Statute.—*Scott v. Hartman*, 26 N. J. Eq. 89; *Corder v. Williams*, 40 Iowa 582; *Cooke v. Cooke*, 43 Md. 522, 531; *Gebhart v. Merfeld*, 51 Md. 322, 325.

Subsequent Creditors.—Some authorities hold that a transfer fraudulent as to existing creditors, may be avoided by subsequent creditors. All agree that if not fraudulent as to existing creditors, subsequent creditors can avoid it only by showing that it was made with a view to incurring liabilities, or embarking in a hazardous business, which gives rise to their debts. *Thacher v. Phinney*, 7 Allen 146; *Winchester v. Charter*, 12 Allen 606, 609; *Wadsworth v. Williams*, 100 Mass. 126, 130; *Day v. Cooley*, 118 Mass. 524, 527; *Dodd v. Adams*, 125 Mass. 398; *Carpenter v. Carpenter*, 25 N. J. Eq. 194; *Kirksey v. Snedecor*, 60 Ala. 192; *Sexton v. Wheaton*, 8 Wheat. 229; *Mattingly v. Nye*, 8 Wall. 370; *Smith v. Hodges*, 92 U. S. 183; *Graham v. Railroad Co.*, 102 U. S. 148, 153; 1 Am. Lead. Cas. 1. Most of the cases hold that, even where the transfer is fraudulent as to existing creditors, to enable a subsequent creditor to set it aside, there must be special circumstances, such as continued possession by the debtor, whereby he obtained the credit, or the fact that the transfer was made on the eve of starting in a hazard-

ous business. The rule is said to be that a transfer is void only as against those it was intended to defraud, and that subsequent creditors cannot, ordinarily, come within that description. *Harlan v. Maglaughlin*, 90 Penna. 293, 297; *Monroe v. Smith*, 79 Penna. 459; *Snyder v. Christ*, 39 Penna. 499, 506; *Shand v. Hanley*, 71 N. Y. 319; *Arrowsmith v. O'Sullivan*, 44 N. Y. Super. Ct. 573; *Mullen v. Wilson*, 44 Penna. 413; *Dorley v. McKiernan*, 62 Ala. 34; *Lloyd v. Bunce*, 41 Iowa 660; *Sanders v. Chandler*, 26 Minn. 273; *Lehmborg v. Biberstein*, 51 Tex. 457.

Is a Voluntary Transfer Conclusively Fraudulent as to Existing Creditors?—In some of the states this is answered in the affirmative, and if debts, existing at the time of a gift or voluntary transfer of the debtor's property, remain unpaid, the creditors may avoid such gift or transfer, although the donor may have reserved ample property to pay all his debts. "A volunteer takes subject to the risk, not of the grantor having other property sufficient to pay his then existing debts, but of his paying those debts." Per *Van Koughnet, C.*, in *Irwin v. Freeman*, 13 Grant Ch. (Ont.) 465, 470; *Haston v. Castner*, 31 N. J. Eq. 697; *Kirksey v. Snedecor*, 60 Ala. 192, 197; *Choteau v. Jones*, 11 Ill. 300, 318; *Hatfield v. Merod*, 82 Ill. 113; 1 Am. Lead. Cas. 39, [37.] But the general rule is that whether a gift of property is fraudulent or not is a question of fact; and if the donor reserves sufficient property to pay his debts, and no actual intent to defraud creditors appears, the gift will be sustained, though the donor becomes insolvent before he had paid the debts existing at the time of the gift. See *Salmon v. Bennett*, 1 Conn. 525; S. C., 1 Am. Lead. Cas. 32, and notes; *Merrell v. Johnson*, 96 Ill.

§ 734. In Twyne's case, (z) the celebrated leading case on this subject, the debtor had made a secret conveyance to Twyne by general deed of all his goods and chattels, worth £300, in satisfaction of a debt of £400, pending an action brought by another creditor for a debt of £200. The debtor continued in possession of the goods, and sold some of them, and shorn the sheep and marked them with his own mark. The second creditor took the goods in execution, but Twyne resisted the sheriff, and Coke, the queen's attorney-general, thereupon filed an information against him in the Star Chamber. The learned author says, in his report, that "In this case, divers points were resolved :

"1. That this gift had the signs and marks of fraud, because the gift is general without exception of his apparel, or of anything of necessity, for it is commonly said, *quod dolosus versatur in generalibus*.

"2. The donor continued in possession, and used them as his own ; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

"3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.⁵⁴

"4. It was made pending the writ.

"5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always appareled and clad with a trust, and trust is the cover of fraud.⁵⁵

"6. The deed contains that the gift was made honestly, truly, and *bona fide* ; *et clausula inconsonata semper inducunt suspicionem*.⁵⁶

§ 735. "Secondly, it was resolved that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, * * * yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* * * * which is accompanied with any trust." Lord Coke therefore advises : "Reader, when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also : 1. Let it be made in a public manner, and before the neighbors, and not in private,

224, 230 ; *Patterson v. McKinstry*, 97 Ill. 41 ; *Pratt v. Curtis*, 2 Low. Dec. 87 ; *Holden v. Burnham*, 63 N. Y. 74 ; *Smith v. Vodges*, 92 U. S. 183.

(z) 3 Coke 80 ; 1 Sm. L. C. 1.

54. *Blennerhasset v. Sherman*, 105 U. S. 100, 115-117.

55. *Bentz v. Rokey*, 69 Penna. 71, 77 ;

Haydock v. Coope, 53 N. Y. 68, 73 ; *Sims v. Gaines*, 64 Ala. 392 ; *Henry v. Hinman*, 25 Minn. 199 ; *Tupper v. Thompson*, 26 Minn. 385. See New Hampshire cases, cited *post* note 60.

56. *Baldwin v. Whitcomb*, 71 Mo. 651, 659.

for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gifts, take the possession of them, for continuance of possession in the donor is the sign of trust. * * *

"And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, *that all statutes made against frauds should be liberally and beneficially expounded to suppress the fraud:*

*'Quaritur, ut crescent tot magno volumine legis
In promptu causa est, crescit in orbe dolus.'*"

§ 736. In the application of the statute, a question of fact for the jury is constantly presented; namely, whether the transfer of the goods was *bona fide*, or fraudulent, that is, "with the end, purpose, and intent to delay, hinder, or defraud creditors," as the act expresses it. It was, indeed, held in some early cases, of which the leading one is *Edwards v. Harben*, (a) that under certain circumstances this was a question of law for the court. The decision was given in that case by Buller, J., who said: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: *that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent.*" (b) As this case does not appear ever to have been overruled, (c) though frequently mentioned unfavorably, it may be assumed that the law would be held to be the same at the present time; but it is to be observed that, in the guarded form in which the principle is announced, a case could scarcely arise in which it would be applicable, for it is difficult to suppose that an action would be tried where *nothing* would be shown beyond a bare conveyance without possession: where something of the relations of the parties, and the circumstances of their dealings, would not appear. Apart from this very exceptional case, the authorities are

Conveyance fraudulent or not, question of fact for jury.

Edwards v. Harben.

(a) 2 T. R. 587, and see *post* § 740.
(b) See, also, *Paget v. Perchard*, 1 Esp. 205; *Martin v. Perchard*, 2 W. Bl. 702.
(c) It was said to be good law by Law-

rence, J., in *Steel v. Brown*, 1 Taunt. 382: see, however, the remarks of Lefroy, C. J., in the Irish case of *Macdona v. Swiney*, 8 Ir. C. L. R. 73, at pp. 84-86.

all in accordance in treating the question of *Fraus vel non*, as one of fact for the jury, even where the vendor remains in possession.

§ 737. In *Latimer v. Batson*, (d) an execution had been levied on the household furniture, wine, &c., of the Duke of Marlborough at Blenheim, and an officer remained in possession some time, and then executed a bill of sale to the execution creditor, but the duke prevailed on the latter to leave him in possession. The execution creditor afterwards sold the goods to the plaintiff Latimer for £700, and the plaintiff put a man-servant into the house. The duke also remained there, and used the goods, as if no execution had been put in; but the execution was known in the neighborhood. The goods were then seized by a second creditor, and carried away. On these facts, Jervis contended that the judge ought to have directed the jury that if they thought the duke remained in possession, the sale was void, citing *Wardall v. Smith*, (e) where Lord Ellenborough said that "to defeat an execution by a bill of sale there must appear to have been a *bona fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable. There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors." But the court refused a new trial, affirming the propriety of the judge's charge, he having told the jury that if they thought the sale to the plaintiff was *bona fide*, and the purchase money really paid by him, he was entitled to a verdict; but if the purchase money was really paid by the duke, and the sale to the plaintiff colorable, they should find for defendant. Bayley, J., also held, in conformity with *Leonard v. Baker*, (f) *Watkins v. Birch*, (g) and *Jezeph v. Ingram*, (h) that "if goods seized under an execution are *bona fide* sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighborhood." 57

§ 738. In *Martindale v. Booth*, (i) all the judges were of opinion

(d) 4 B. & C. 652.

(e) 1 Camp. 332.

(f) 1 M. & S. 251.

(g) 4 Taunt. 823.

(h) 8 Taunt. 838.

57. In Pennsylvania, though in general leaving the property sold in possession of the seller is conclusive evidence of fraud

as to third persons, an exception is made in the case of official sales under execution. Leaving the property in possession of the judgment debtor raises no presumption of fraud. *Walter v. Gernant*, 13 Penna. 515; *Craig's Appeal*, 77 Penna. 448; *Maynes v. Atwater*, 88 Penna. 496.

(i) 3 B. & Ad. 498.

that the continuance of possession in the vendor is not, of itself, sufficient to render void a sale of goods as fraudulent, especially where the possession is consistent with the deed which provides only for the future entry into possession by the purchaser, conditioned on the vendor's default; and in addition to the numerous cases there cited, those in the note (k) sufficiently establish the proposition that the *continued possession by the vendor of goods sold, is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se.* 58

Martindale v. Booth.

(k) *Lady Arundel v. Phipps*, 10 Ves., Jr., 145; per Buller, J., in *Hazellington v. Gill*, 3 T. R. 620, note a; *Linden v. Sharp*, 6 M. & G. 895-898; *Pennell v. Dawson*, 18 C. B. 355.

58. *Possession Retained by the Seller is Evidence of Fraud, but is not Fraud.*—This is the doctrine sustained by most of the recent American authorities, in the absence of controlling statutes. In the United States Supreme Court the case of *Hamilton v. Russell*, 1 Cranch 310, where possession in the seller was adjudged to be fraud, was substantially (though not expressly) overruled in *Warner v. Norton*, 20 How. 448, 460. McLean, J., said: "For many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury, under the instruction of the court. Where possession of goods does not accompany the deed, it is *prima facie* fraudulent, but open to the circumstances of the transaction which may prove an innocent purpose." And a charge of the court below to that effect was held correct. See *Robinson v. Elliott*, 22 Wall. 513, 523. The following cases sustain this view. Those in support of the opposite doctrine are stated *post* note 60.

Rhode Island.—*Anthony v. Wheatons*, 7 R. I. 490, 498; *Sarle v. Arnold*, 7 R. I. 582, 587.

New York.—The earlier cases in New York followed *Edwards v. Harben* and *Hamilton v. Russell*, 1 Cranch 309. See

Sturtevant v. Ballard, 9 Johns. 337, per Kent, C. J., (1812.) But the modern English doctrine was followed in *Bissell v. Hopkins*, 3 Cowen 166, 188, where a full discussion of the subject by the reporter will be found. Subsequently a statute was passed which the Supreme Court held to restore the rule of *Edwards v. Harben*; *Beekman v. Bond*, 19 Wend. 444; *Randall v. Cook*, 17 Wend. 56. But the Court of Errors and Appeals overruled these decisions in *Smith v. Acker*, 23 Wend. 653, (1840.) The question discussed was under the New York statute of frauds, but as interpreted by the last case (p. 676) the statute only declared the law previously existing, without settling the question in dispute. This decision led to a spirited conflict between the Court of Errors and Appeals and the Supreme Court, the latter then composed of eminent jurists. The opinions in *Smith v. Acker* were keenly criticised in *Butler v. Van Wyck*, 1 Hill 438, 450, (1841), which was in turn criticised with unusual warmth by some of the senators in the higher court, in *Hanford v. Artcher*, 4 Hill 271, (1842.) It was determined in the last-mentioned case that where the seller retains possession, evidence of good faith will rebut the presumption of fraud that arises from non-delivery. This was approved in *Michell v. West*, 55 N. Y. 107, (1873), where the court said that if the sale was shown to be *bona fide*, it was not necessary to offer any excuse for permitting possession to remain in the ven-

dor. The rule now is that possession retained by the seller raises a presumption of fraud, that it may be rebutted by proof of good faith, and that when any evidence in rebuttal is offered, the validity of the transaction is a question for the jury. *Blaut v. Gabler*, 77 N. Y. 461; *May v. Walter*, 56 N. Y. 8; *Tison v. Terwilliger*, 56 N. Y. 273; *Van Buskirk v. Warren*, 4 Abb. (N. Y.) App. Dec. 457; *Tate v. McCormick*, 23 Hun 218; *Betz v. Connor*, 7 Daly 550; *Schoonmaker v. Vervalen*, 9 Hun 138; *Hollacker v. O'Brien*, 5 Hun 277.

New Jersey.—Here *Edwards v. Harben* was approved by a *dictum* in *Chumar v. Wood*, 6 N. J. L. 155, but this was overruled, and the rule declared "that possession in the vendor is *prima facie* evidence of fraud, but may be explained." *Miller v. Pancoast*, 29 N. J. L. 250; *Hall v. Snowhill*, 14 N. J. L. 8; *Runyon v. Groshon*, 12 N. J. Eq. 86.

Virginia.—In this state, also, possession in the seller was formerly held to be conclusive evidence of fraud as to his creditors. These decisions were overruled in *Davis v. Turner* 4 Gratt. 422, (1848), which is now the law of that state. *Forkner v. Stewart*, 6 Gratt. 197; *Dance v. Seaman*, 11 Gratt. 778; *Sipe v. Earman*, 26 Gratt. 563, (1875); *Balt. & O. R. R. v. Glenn*, 28 Md. 287, 324, applying Virginia law.

North Carolina.—*Rea v. Alexander*, 5 Ired. L. 644; *Boone v. Hardie*, 83 N. C. 470.

South Carolina.—*Terry v. Belcher*, 1 Bailey 568; *Smith v. Henry*, 2 Bailey 118. But a transfer to pay a debt will be void unless possession is given. *Fulmore v. Burrows*, 2 Rich. Eq. 96.

Georgia.—*Peck v. Land*, 2 Kelly 1; *Carter v. Stanfield*, 8 Ga. 49; *Collins v. Taggart*, 57 Ga. 355.

Alabama.—*Mayer v. Clark*, 40 Ala. 259, 269; *Crawford v. Kirksey*, 50 Ala. 590, 598; Same case, 55 Ala. 232, 285.

Mississippi.—*Comstock v. Rayford*, 12 Sm. & M. 369; *Carter v. Graves*, 6 How. (Miss.) 9; *Rankin v. Holloway*, 3 Sm. &

M. 614; *Summers v. Roas*, 42 Miss. 749; *Hilliard v. Cagle*, 46 Miss. 309.

Louisiana.—*Spivey v. Wilson*, 31 La. Ann. 653; *Devonshire v. Gathreaux*, 32 La. Ann. 1132; *Richardson v. Cramer*, 28 La. Ann. 357.

Texas.—*Gibson v. Hill*, 21 Tex. 225; *Green v. Banks*, 24 Tex. 508; *Kerr v. Hutchins*, 46 Tex. 384; *Scott v. Alford*, 53 Tex. 82, 92.

Arkansas.—*Hempstead v. Johnston*, 18 Ark. 123, 134; *George v. Norris*, 23 Ark. 121, 128.

Tennessee.—*Young v. Pate*, 4 Yerg. 164; *Maney v. Killough*, 7 Yerg. 443; *Darwin v. Handley*, 3 Yerg. 502; *Galt v. Dibrell*, 10 Yerg. 146; *Tennessee National Bank v. Ebbert*, 9 Heisk. 153.

Ohio.—*Rogers v. Dare*, Wright 136; *Burbridge v. Seeley*, Wright 359; *Hombeck v. Vanmetre*, 9 Ohio 153; *Collins v. Meyers*, 16 Ohio 547, 552.

Indiana.—*Nutter v. Harris*, 9 Ind. 88; *Kane v. Drake*, 27 Ind. 29; *Rose v. Colter*, 76 Ind. 590. In this case *Elliot*, C. J., said: "It is firmly established that under a statute, fraud is a question of fact." Cites *Leasure v. Coburn*, 57 Ind. 274; *Bentley v. Dunkle*, 57 Ind. 374.

Michigan.—*Molitor v. Robinson*, 40 Mich. 200; *Webster v. Bailey*, 40 Mich. 641; *Carpenter v. Graham*, 42 Mich. 191; *Webster v. Anderson*, 42 Mich. 554; *McLaughlin v. Lange*, 42 Mich. 81.

Wisconsin.—*Sterling v. Ripley*, 3 Chand. 166; *Whitney v. Brunette*, 3 Wis. 621; *Smith v. Welch*, 10 Wis. 91; *Bullis v. Borden*, 21 Wis. 135; *Williams v. Porter*, 41 Wis. 422.

Minnesota.—*Vose v. Stickney*, 19 Minn. 367, 369.

Kansas.—*Phillips v. Riets*, 16 Kan. 396, 400.

Nebraska.—*Robison v. Uhl*, 6 Neb. 328; *Morgan v. Bogue*, 7 Neb. 429; *Densmore v. Tower*, 11 Neb. 118; *Miller v. Morgan*, 11 Neb. 121.

Oregon.—*Moore v. Floyd*, 4 Oreg. 101; *McCully v. Swackhamer*, 6 Oreg. 438.

But Possession Coupled with the

That the notoriety of the sale is a strong circumstance to rebut the presumption of fraud even where the vendor retains possession, is shown by the cases quoted in the above opinion, delivered by Bayley, J., in *Latimer v. Batson*, to which may be added *Kidd v. Rawlinson*, (*l*) *Cole v. Davies* (*m*) [and *Macdona v. Swiney*. (*n*)]

Notoriety of the sale rebuts presumption of fraud.

In *Hale v. Metropolitan Omnibus Company*, (*o*) Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a valuable consideration."

No general rule. Every case decided on its own circumstances.

§ 739. It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bona fide* for a valuable consideration. (*p*) Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor; (*q*) nor to confess a judgment in favor of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained. (*r*)⁵⁹

Mere intent to defeat execution.

Confession of judgment, with intent to give preference.

Power to Sell Goods Retained by the Seller, Constitute Fraud.—*Robinson v. Elliott*, 22 Wall. 513, 524; *Southard v. Benner*, 72 N. Y. 424; *Freeman v. Rawson*, 5 Ohio St. 1; *Barnet v. Fergus*, 51 Ill. 58; *Harmon v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843. If, however, the seller in possession sells the goods as agent and for the benefit of the buyer, the transaction will be valid. *Goodheart v. Johnson*, 88 Ill. 58. And the question of fraud in every such case is one of fact. *Scott v. Alford*, 53 Tex. 82, 95; *Weber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632; *Brett v. Carter*, 2 Low. Dec. 458; *Hughes v. Cory*, 20 Iowa 399; *Gay v. Bidwell*, 7 Mich. 519; *contra*, *Griswold v. Sheldon*, 4 N. Y. 501; *Edgell v. Hart*, 9 N. Y. 2, 6; *Russell v. Winne*, 37 N. Y. 591, 595; *Tennessee Bank v. Ebbert*, 9 Heisk. 153, 159; *Collins v. Meyers*, 16 Ohio 547. (*l*) 2 Bos. & P. 59. (*m*) 1 Ld. Raym. 724. (*n*) 8 Ir. C. L. R. 73. (*o*) 30 L. J., Ch. 777. (*p*) *Wood v. Dixie*, 7 Q. B. 892; *Riches v. Evans*, 9 C. & P. 640; *Hale v. Metropolitan Omnibus Co.*, 30 L. J., Ch. 777. (*q*) *Darvill v. Terry*, 6 H. & N. 807 and 30 L. J., Ex. 355. (*r*) *Holbird v. Anderson*, 5 T. R. 235 59. An Insolvent Debtor May Sell His Property.—Otherwise he would not be able to apply his property to pay his debts. "If the transaction be an honest

§ 740. In America, it is somewhat remarkable that the ruling of the King's Bench, in *Edwards v. Harben*, (s) has not only been followed to its full extent, but the doctrine has been pushed even beyond the principle there established. ⁶⁰ Chancellor Kent erroneously supposes the English law to

Decisions in
America.

*Edwards v.
Harben* fol-
lowed.

one, in good faith and for an adequate consideration, it matters not how many creditors may be thereby prevented from reaching the property." *Miller v. Kirby*, 74 Ill. 242, 246; *Wood v. Shaw*, 29 Ill. 444; *Bowden v. Bowden*, 75 Ill. 143, 147; *Erb v. Cole*, 31 Ark. 554.

An Innocent Purchaser is Protected.

—An innocent purchaser from one who sells with intent to defraud his creditors stands on the same footing with one who has purchased property to which the seller has obtained title by fraud. See *ante* § 649, note 15; *Farrell v. Colwell*, 30 N. J. L. 123; *Atwood v. Impson*, 20 N. J. Eq. 150, 155; *Scott v. Heilager*, 14 Penna. 238; *Kellogg v. Aherin*, 48 Iowa 299; *Massie v. Enyart*, 32 Ark. 251.

Preferences.—The general rule is thus stated in *York County Bank v. Carter*, 38 Penna. 446, 453: "An insolvent creditor may prefer one creditor to another either by judgment or deed, in any mode except by an assignment in trust. The effect of such preference may be to delay a creditor not preferred, in fact to prevent his obtaining payment at all; but if the motive, the honest intent, was to pay the preferred debt, the transaction is not invalidated by the statute of 13 Eliz." See *Gans v. Benschaw*, 2 Penna. St. 36; *Covanhovan v. Hart*, 21 Penna. 495; *Marbury v. Brooks*, 7 Wheat. 556; S. C., 11 Wheat. 78; *Tompkins v. Wheeler*, 16 Pet. 118. "The debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious. Yet their case is not remedial." *Catron, J.*, in *Clarke v. White*, 12 Pet. 178, 200. *Blennerhassett v. Sherman*, 105 U. S. 100, 117; *Ferguson v. Spear*, 65 Me. 277. (Held here that a

man may prefer his wife if she is his creditor. And to the same effect is the next case.) *Brigham v. Fawcett*, 42 Mich. 542; *Hill v. Bowman*, 35 Mich. 191; *Beurmann v. Van Buren*, 44 Mich. 496, 499; *Dudley v. Danforth*, 61 N. Y. 626; *Smith v. Skeary*, 47 Conn. 47, 54. (In this case the creditors obtained a preference from a corporation in which they were directors, but it was sustained, being *bona fide*.) *Fleischer v. Dignon*, 53 Iowa 288; *Whitehead v. Woodruff*, 11 Bush 209; *Gage v. Chesebro*, 49 Wis. 486, 494; *Eldridge v. Phillipson*, 58 Miss. 270; *Butler v. White*, 25 Minn. 432.

(s) 2 T. R. 587; *ante* § 736.

60. DECISIONS THAT SALES ARE VOID AS TO CREDITORS OF AND PURCHASERS FROM THE SELLER UNTIL DELIVERY IS MADE.

Federal Courts.—In these courts by the earlier decisions the doctrine of *Edwards v. Harben* was carried very far. In the case of *Hamilton v. Russell*, 1 Cranch 309, 316, Marshall, C. J., said that fraudulent conveyances would be "most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession accompanies and follows the deed. This construction, too, comports with the words of the act." This was followed in the Admiralty case of *The Schooner Romp*, Olcott Adm. 196, 203, where Betts, J., said: "This conclusion of law cannot be displaced by evidence proving the *bona fides* of the transaction." The same doctrine was held in *Allen v. Massey*, 17 Wall. 351, but solely on the ground of a Missouri statute, the law of that state ruling the case. On the other hand, the modern English doctrine is approved by the United States

consider the relationship existing between the directors and the persons who have actually committed the fraud. In *Peek v. Gurney*, (g) where the action was brought by a shareholder against the directors of Overend, Gurney & Co., for false and fraudulent representations contained in the prospectus of the company intended to carry on the business of the firm of Overend & Gurney, it was attempted on behalf of Barclay, one of the defendant directors, to relieve him from liability on the ground that he had taken no part in, and given no express authority for the preparation and publication of the fraudulent prospectus which, in fact, he had never read until after the company had stopped payment. But this defence was held unavailing, and Lord Chelmsford, in moving the judgment of the House of Lords, said (at p. 392), "The short answer to this defence is, that he was acquainted with all that the other directors knew; he consented to become a director, knowing that a prospectus would, as a matter of course, be issued: he signed the memorandum and articles of association referred to in the prospectus; and, upon receipt of the prospectus, he filled up and signed the form of application for shares, printed with and forming part of the prospectus. Can he, upon these facts, be heard to say that he did not authorize the prospectus, or sanction its publication?"

statements
contained in
prospectuses
or other docu-
ments.
Peek v.
Gurney.

§ 711. In *Weir v. Bell*, (h) the defendant directors had been authorized by the company to issue debentures. Afterwards, the directors at a board meeting authorized the secretary of the company to employ a firm of brokers to place the debentures. The secretary accordingly employed brokers on behalf of the company, who, without any express authority from the directors, issued a prospectus containing false and fraudulent statements, on the faith of which the plaintiff purchased debentures which proved to be worthless.

Weir v. Bell.

The action was brought against several of the directors in the first instance, and the judgment of the Exchequer Division was in favor of them all, proceeding upon the ground that the brokers were the agents of the company, and not of the directors, and disregarding the finding of the jury upon this head as contrary to the evidence. The plaintiff appealed only against the judgment in favor of the defendant Bell. It was held by the majority of the Court of Appeal, consisting

v. *The City of Glasgow Bank*, 5 App. Cas. 817.

(h) 3 Ex. D. 288, C. A.; S. C., *sub nom.* *Weir v. Barnett*, Id. 82.

(g) L. R., 6 H. L. 377.

253; Putnam v. Osgood, 52 N. H. 148, 154; Coolidge v. Melvin, 42 N. H. 510; Lang v. Stockwell, 55 N. H. 561. In this last case the seller reserved the right to use the horse and wagon which he sold, about his business. The property being seized for the seller's debt, the buyer brought trespass. Smith, J., said: "Unless we are to disregard the numerous decisions in this state, commencing with Coburn v. Pickering, of which I believe there are seventeen, where such sales are held to constitute a fraud in law, the court has no other alternative than to pronounce the sale fraudulent as against the creditors of M.," (the seller.)

Vermont.—The same rule prevails in this state. Rockwood v. Collamer, 14 Vt. 141; Stephenson v. Clark, 20 Vt. 624; Weeks v. Prescott, 53 Vt. 57, 72; Hildreth v. Fitts, 53 Vt. 684, 687; Pettingill v. Elkins, 50 Vt. 431.

Connecticut.—In this state Edwards v. Harben and the United States Supreme Court case of Hamilton v. Russell, 1 Cranch 309, were approved and followed in Swift v. Thompson, 9 Conn. 63, 69, and no state has carried the doctrine of those cases further. In Norton v. Doolittle, 32 Conn. 411, the court said: "Purchasers must learn that if they purchase property, and without a legal excuse permit the possession to remain in fact or apparently and visibly the same, they hazard its loss by attachment for the debts of the vendor." This language is approved in Hatstat v. Blakeslee, 41 Conn. 301, and Pardee, J., said it was a rule of policy to prevent fraud, and was to be inflexibly maintained. Mead v. Noyes, 44 Conn. 487.

Pennsylvania.—The law of Pennsylvania resembles closely that of Massachusetts. It is stated with great fullness in McKibbin v. Martin, 64 Penna. 352, 356. In that case the seller of the furniture in a hotel remained in the employ of the buyer, and the question was whether the property was liable for the

debts of the seller. Sharswood, J., said: "Clow v. Woods, 5 S. & R. 275, decided by this court in 1819, is the *magna charta* of our law upon this subject. It established that retention of possession was fraud in law, wherever the subject of transfer was capable of delivery, and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. * * * The court is to judge whether there is sufficient evidence to justify the inference of such delivery." The court also approved Babb v. Clemson, 10 S. & R. 428, and quoted it as follows: "There cannot be a concurrent possession in the assignor and assignee; it must be exclusive, or it is deemed fraudulent and colorable. To defeat the execution, there must have been a *bona fide*, substantial change of possession. It is a mere mockery to put in another person to keep possession jointly with the former owner." In McKibbin v. Martin, as there was evidence of actual change of possession, it was left to the jury to determine whether the change was *bona fide*, and whether there was concurrent possession. See cases cited in McKibbin v. Martin. See Young v. McClure, 2 W. & S. 150; McBride v. McClelland, 6 W. & S. 94; Boyle v. Rankin, 22 Penna. 168; Winslow v. Leonard, 24 Penna. 14, 18; Garman v. Cooper, 72 Penna. 32, 36; McMarlan v. English, 74 Penna. 296; Evans v. Scott, 89 Penna. 136. But continued possession of the seller under a lawful contract to hold the property as the buyer's bailee will protect the property against the seller's creditors. Smith v. Crisman, 91 Penna. 428. And where the property is in the possession of a third person no delivery or notice seems to be necessary in Pennsylvania. Linton v. Butz, 7 Penna. 89; Worman v. Kramer, 73 Penna. 378, 385; Woods v. Hull, 81 Penna. 451. But see Trunick v. Smith, 63 Penna. 18.

Delaware.—Burman v. Herring, 4 Harr. 458; Perry v. Foster, 3 Harr. 293.

be unsettled on the question, (t) but he states it to be the established law in the federal courts of the United States, that an absolute bill of sale is *itself* a fraud in law unless possession accompanies and follows the deed; and in a recent case (b) it was even decided that the *bona fides* of the transaction between the parties, and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid. This seems also to be the doctrine of the state courts in Virginia, (c) South Carolina, Pennsylvania, Illinois, New Jersey, Vermont, and Connecticut, while the English rule pervades the other states. 61

Maryland.—Gough v. Edelen, 5 Gill 101; Green v. Treiber, 3 Md. 28.

Florida.—Smith v. Hines, 10 Fla. 258, 295; Wilson v. Lott, 5 Fla. 305, 325; Gibson v. Love, 4 Fla. 217, 238.

Missouri.—In this state the sale of goods is void as to creditors and purchasers "unless accompanied by delivery in a reasonable time," by act of 1865. See history of the law in Claffin v. Rosenberg, 42 Mo. 439, 448; S. C., 43 Mo. 593; Allen v. Massey, 17 Wall. 351; Bishop v. O'Connell, 56 Mo. 158; Wright v. McCormick, 67 Mo. 426; Stern v. Henley, 68 Mo. 262; Cator v. Collins, 2 Mo. App. 225; Basse v. Thomas, 3 Mo. App. 472.

Kentucky.—Brummel v. Stockton, 3 Dana 135; Robbins v. Oldham, 1 Duval 28; Allen v. Johnson, 4 J. J. Marsh. 235; Anthony v. Wade, 1 Bush 110; Morton v. Ragan, 5 Bush 334; Woodrow v. Davis, 2 B. Mon. 298; Kendall v. Hughes, 7 B. Mon. 368, 370.

Illinois.—In this state great importance is attached to actual possession. In Thompson v. Yeck, 21 Ill. 73, Breese, J., said that possession permitted to remain with the vendor was fraudulent in itself, and void as to creditors and purchasers. And this has been followed since. Ketchum v. Watson, 24 Ill. 591; Walker v. Collier, 37 Ill. 362; Thompson v. Wilhite, 81 Ill. 356; Lefever v. Mires, 81 Ill. 456; McCann v. Meyer, 4 Brad. 376; Straus v. Minzesheimer, 78 Ill. 492; Ticknor v. McClelland, 84 Ill. 471, 474; Allen v. Carr, 85 Ill. 388. An exception

to the rule is recognized in the case of grain in a warehouse. Such property is transferred sufficiently by delivery of the warehouse receipt. Broadwell v. Howard, 77 Ill. 305.

Iowa.—Section 1923 of the code provides that "no sale of personal property where the vendor retains actual possession is valid against existing creditors or subsequent purchasers without notice," unless a written instrument of conveyance is recorded. Under the statute, see Boothby v. Brown, 40 Iowa 104; Sutton v. Ballou, 46 Iowa 517; McKay v. Clapp, 47 Iowa 418; Smith v. Champney, 50 Iowa 174; Hickok v. Buell, 51 Iowa 655.

California.—O'Brien v. Chamberlain, 50 Cal. 285; Grum v. Barney, 55 Cal. 254; Watson v. Rodgers, 53 Cal. 401.

Nevada.—Gray v. Sullivan, 10 Nev. 416; Lawrence v. Burnham, 4 Nev. 361, 366.

Colorado.—McCraw v. Welch, 2 Col. T. 284.

Ontario.—Ranney v. Moody, 6 U. C. C. P. 471; William v. Rapelje, 8 Id. 186.

(t) 2 Kent 521.

(b) The Romp, Olcott's Adm. 196, cited in note, at p. 520, 2 Kent (12th ed.)

(c) The English doctrine, it would seem, is now established in Virginia. See The Baltimore and Ohio Railroad Co. v. Glenn, 28 Md. 287, at pp. 324, 325, where the Virginia authorities are reviewed.

61. This is quite inaccurate, our author having been misled by overruled decis-

§ 741. [The legislation with reference to bills of sale has rendered obsolete a part of the law under the statute of 13 Eliz., c. 5, so far as relates to the transfer of chattels. The statutes now in force are the 41 and 42 Vict., c. 31 (bills of sale act, 1878,) and the 45 and 46 Vict., c. 43 (bills of sale act (1878) amendment act, 1882.) By the bills of sale act, 1878, the 17 and 18 Vict., c. 36 (bills of sale act, 1854,) and the 29 and 30 Vict., c. 96 (bills of sale act, 1866,) were repealed, except as to bills of sale executed before the 1st of January, 1879 (the day when the act came into operation), and even as to such bills of sale the rules with respect to construction, and to the renewal of registration, were to be those of the act of 1878.

The object of the legislation on this subject is thus stated in the preamble to the act of 1854: "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors."]

SECTION V.—FRAUD ON CREDITORS—BILLS OF SALE.

§ 742. [By reason of the passing of the bills of sale acts, 1878 and 1882, since the second edition of this treatise, a large portion of the law under the act of 1854 has been rendered obsolete. The editors have therefore found it necessary to rewrite this portion of the work; and, in doing so, have deemed it advisable to treat the subject under a separate section. It has been thought well to set out in full the main provisions of the act of 1878, with the principal decisions thereunder, briefly noticing the alterations occasioned by the act of 1882. (d) Those portions of the act of 1878 which were not contained in the previous act of 1854 are printed in italics.⁶²

ions. The case of "The Romp" is by no note 6.

means recent, and the latest decision in the United States Supreme Court overrules it. (20 How. 460.) The modern English doctrine has also been long adopted in Virginia, South Carolina and New Jersey. See *ante* note 58. On the other hand, many states have adopted the rule in *Edwards v. Harben*. See *ante*

(d) This act only received the royal assent at the time when the sheets of this edition were passing through the press.

62. These acts cover the same class of transactions provided for in America by the "chattel mortgage acts." Those acts are simple and easily applied, and contrast favorably with the cumbrous piece

§ 743. By the 4th section, "The expression 'bill of sale' is to include bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods,* and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, *and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred,* but is not to include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

4th section.

Definition of bill of sale.

What are not included.

In the case of *Allsopp v. Day*, (s) a receipt for money given by a husband to the trustees of his wife's settlement "for the purchase of my household goods and effects contained in the enclosed inventory" was held under the act of 1854 not to be a bill of sale; and this decision was followed in *Byerly v. Prevost*. (t)

Inventories of goods with receipt attached.

Allsopp v. Day.

But the authority of these cases had been questioned before the act of 1878 in *Ex parte Odell* (u) and *Ex parte Cooper*, (x) and now they are expressly within the words of the above section.

Ex parte Odell.*Ex parte Cooper*.

§ 744. The effect, however, of the section is much restricted by the late decision of the Court of Appeal in *Marsden v. Meadows*, (y) where it was decided that an inventory of

Marsden v. Meadows.

of English legislation discussed in this section. They form a subject by itself, which, as it is somewhat aside from the subject of this treatise, and cannot be adequately considered in the limits of these notes, the editor will not attempt to

illustrate by citations.

(s) 7 H. & N. 457; 31 L. J., Ex. 105.

(t) L. R., 6 C. P. 144.

(u) 10 Ch. D. 76, C. A.

(x) Id. 313, C. A.

(y) 7 Q. B. D. 80, C. A., following

goods with a receipt for the purchase money given to a purchaser by a sheriff who had seized under a writ of *fi. fa.* does not amount to a bill of sale under this section, and need not be registered. The restriction intended to be put upon the words of the enactment appears to be that inventories and receipts to be within the act must operate as assurances, or to use Lord Justice Cotton's words, must be "documents on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a munimen^t or document of title taken, to use an expression found in some of the cases, at the time as a record of the transaction." Here the claimant had a complete title to the goods, before the receipt by the sheriff was given. The receipt was mere surplusage.

The words "any agreement * * * by which a right in equity to any chattels shall be conferred" are declaratory of the law as laid down in cases before the act. (z)

As to transfers of shares in ships, reference should be made to the merchant shipping act, 1854 (17 and 18 Vict., c. 104, §§ 55, 57, 81.) And a ship built for a foreigner, and which, therefore, could not be registered as a British ship, is within the exception. (a)

As to transfers of goods in the ordinary course of business, the reader is referred to the cases below cited. (b)

Foreign parts. Foreign parts include Scotland. (c)

§ 745. In *Ex parte Crawcour*, (d) it was held under the act of 1854 that an agreement for the hire and conditional purchase, by installments, of furniture, whereby the property in the furniture was to remain in the lessor until the payment of all the installments, and he was to have *power to seize the furniture upon failure to pay any of the installments*, did not amount to a bill of sale by the hirer to the lessor, inasmuch as no property in the furniture passed to the hirer until the payment of the full amount of the installments.

§ 746. By the 4th section it is also provided, that "The expression

Woodgate v. Godfrey, 5 Ex. D. 24, C. A.; (b) *Ex parte North Western Bank*, 15 S. C., 4 Ex. D. 59, decided under the act Eq. 69; *Ex parte Conning*, 16 Eq. 414; of 1854. *Merchant Banking Co. v. Spoffen*, 11 Ir. R. Eq. 586; *Ex parte Watson*, 5 Ch. D. 35, C. A.

(*) *Ex parte Mackay*, 8 Ch. 643; *Ex parte Conning*, 16 Eq. 414.

(a) *Union Bank v. Lenanton*, 3 C. P. D. 243, C. A. (c) *Coot v. Jecks*, 13 Eq. 597. (d) 9 Ch. D. 419.

'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:" and by the 7th section, which should be read together with it, "*No fixtures or growing crops shall be deemed, under this act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.*" (e)

4th section.

Definition of personal chattels.

7th section.

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

Growing crops were held under the act of 1854 not to be personal chattels within the meaning of that act, (f) but upon severance the crops become personal chattels, and therefore subject to the provisions of the act. (g)

Growing crops.

A consideration of the case of *Meux v. Jacobs*, (h) together with the two sections above cited, will show what the words "when separately assigned or charged" were intended to cover.

"When separately assigned or charged."

Trade machinery is dealt with separately by the 5th section, post § 751, and any mortgage of trade machinery must (it would seem) be registered as a bill of sale, whether it is separately assigned or not. (i)

Trade machinery.

(e) This section is made retrospective.

(h) L. R., 7 H. L. 481.

(f) *Brantom v. Griffiths*, 2 C. P. D. 212, C. A.; affirmed, S. C., 1 C. P. D. 349.(i) As to the law previous to the act, see *Mather v. Fraser*, 25 L. J., Ch. 361; *Waterfall v. Penistone*, 6 E. & B. 876, and 26 L. J., Q. B. 100.(g) *Ex parte National Mercantile Bank*, 16 Ch. D. 104, C. A.

§ 747. By the 4th section it is further provided, that "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

This, with the exception of a slight verbal alteration, is identical with the definition of "apparent possession" given in the 7th section of the act of 1854.

The 8th section, *post* § 755, deals with the effect of goods comprised in an unregistered bill of sale remaining in the possession or apparent possession of the grantor.

The latter words of the clause qualify what precedes them, and therefore if more than formal possession has been taken by the grantee, the clause does not apply. (*k*)

What is required, in order to constitute a more than formal possession, has not been judicially defined, but in the note *infra*, (*l*) will be found some of the cases which have been decided on this head. It is, in general, a question of fact for the jury to decide.

§ 748. A difficulty was felt as to taking more than formal possession of growing crops, and it was laid down in *Sheridan v. Macartney*, (*m*) that so long as they are upon land occupied by the grantor, they must be in his apparent possession. This case, however, has not met with approval in the English courts, (*n*) and in *Ex parte Arnison* (*o*) (which was, however, a case of distress for tithe rent-charge) it was intimated that, after possession of growing crops has once been taken, a notice to inform the public would be sufficient.

Upon the word "occupied" it has been held that actual *de facto* occupation is meant. (*p*) If the grantor does not personally occupy the premises, the goods are not in his ap-

(*k*) *Gough v. Everard*, 2 H. & C. 12; 516, C. A.
Ex parte Lewis, 6 Ch. 626.

(*m*) 11 Ir. C. L. Rep. 506.

(*l*) *Ex parte Jay*, 9 Ch. 697; *Ex parte Homan*, 10 Eq. 63; *Smith v. Wall*, 18 L. T. (N. S.) 182; *Davies v. Jones*, 10 W. R. 779; *Emmanuel v. Bridger*, L. R., 9 Q. B. 286; *Ancona v. Rogers*, 1 Ex. D. 285, C. A.; *Ex parte Fletcher*, 5 Ch. D. 809, C. A.; *Seal v. Claridge*, 7 Q. B. D.

(*n*) See remarks by Bramwell, B., in *Gough v. Everard*, 2 H. & C., at p. 12, and Brett, J., in *Brantom v. Griffiths*, 1 C. P. D., at p. 355.

(*o*) L. R., 3 Ex. 56.

(*p*) *Robinson v. Briggs*, L. R., 6 Ex. 1.

parent possession. (g) Occupation by him as a servant to the grantee is sufficient. (r) In *Seal v. Claridge*, (s) the goods were in the grantor's house, of which the grantor possessed a key. He did not sleep there, but went in and out as he pleased. Held, that this amounted to a personal occupation by the grantor, and that the goods were in his apparent possession.

§ 749. Possession by a bailee on behalf of the grantor was held in *Ancona v. Rogers*, (t) to be his possession, although the grantee had attempted ineffectually, owing to the refusal of the owner of the house where the goods were, to get access to them. But it is otherwise if the bailee holds on behalf of some third party. (u)

Possession by
bailee.

In *Ex parte Saffery*, (x) it was held that goods in the actual visible possession of the sheriff under an execution are not in the apparent possession of the grantor, and the earlier case of *Ex parte Mutton* (y) was not followed.

Possession by
sheriff.

In this connection reference should be made to the doctrine of "reputed ownership" under the bankruptcy laws.

By § 15, subs. 5 of the bankruptcy act, 1869 (32 and 33 Vict., c. 71,) it is provided that the property of a bankrupt divisible among his creditors shall include, *inter alia* :—

Reputed own-
ership in bank-
ruptcy as
affecting bills
of sale.

"All goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, *being a trader*, by the *consent and permission* of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action other than debts due to him in the course of his trade or business shall not be deemed goods and chattels within the meaning of this clause."

The 20th section of the act of 1878 made an important alteration in the existing law by providing that "*Chattels comprised in a bill of sale which has been and continues to be duly registered under this act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the bankruptcy act, 1869.*"

Law under act
of 1878.

(g) *Gough v. Everard*, 2 H. & C. 1.

(u) *Market Banking Co. v. Spoffen*, 11

(r) *Pickard v. Marriage*, 1 Ex. D. 364. Ir. R. Eq. 587.

(s) 7 Q. B. D. 516, C. A.

(x) 16 Ch. D. 668, C. A.

(t) 1 Ex. D. 205, C. A.

(y) 14 Ex. 178.

Under the bills of sale act, 1854, there was no similar provision, and it was decided that, where the grantor was a trader, goods comprised in a bill of sale, although registered, remained until demand in his order and disposition, and in the event of his bankruptcy vested in his trustee.

§ 750. And now the 15th section of the act of 1882 expressly repeals the above section, and revives, at any rate so far as relates to bills of sale given by way of mortgage, the doctrine of reputed ownership. This restores the authority of the cases decided previous to the year 1879, the most important of which are given in the note, *infra*. (2)

The following are the chief points of distinction between "apparent possession" under the bills of sale act, 1878, and "reputed ownership" under the bankruptcy act:

Distinction between "apparent possession" and "reputed ownership."

1. The reputed ownership clause applies only to *traders*.
2. Under the reputed ownership clause it is necessary that the true owner should consent, and a demand by the true owner excludes its application, whereas, as we have seen, it is different in the case of apparent possession (*Ancona v. Rogers, ubi supra*.)
3. The only person who is favored by "reputed ownership" is the trustee in bankruptcy or liquidation, whereas an unregistered bill of sale is also void as against execution creditors.
4. Reputed ownership applies to personal chattels incapable of complete transfer by delivery, *e. g.*, shares, stock and trade debts, whereas the bills of sale act does not.
5. Reputed ownership does not apply to fixtures including therein trade machinery, whereas the bills of sale act applies to trade machinery in all cases, and also to other fixtures "when they are separately assigned or charged."
6. Reputed ownership applies, although the goods are neither in the possession nor the apparent possession of the bankrupt, whereas by the bills of sale act they must be in the grantor's possession or apparent possession.
7. Reputed ownership does not apply when the goods come into the bankrupt's possession after the commencement of the bankruptcy,

(2) *Freshney v. Carrick*, 1 H. & N. 653; *Cubitt*, 2 De G. & J. 222; *Spackman v. Reynolds v. Hall*, 4 H. & N. 519; *Badger Miller*, 12 C. B. (N. S.) 669; *Ex parte Shaw*, 2 E. & E. 472; *Stansfield v. Harding*, 15 Eq. 223.

whereas the words of the bills of sale act are "at or after the time of filing the petition for bankruptcy." (a)

If the true effect of the 15th section of the act of 1882 is to repeal absolutely the 8th section of the act of 1878 (as to which, see *post* § 774,) the doctrine of apparent possession will, for the future, be of importance only in reference to bills of sale, registered before the 1st of November, 1882, and the doctrine of reputed ownership alone applies to all bills of sale registered after that date.

§ 751. By the 5th section, "*Trade machinery shall, for the purposes of this act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this act.*"

5th section.

Application of act to trade machinery.

The section proceeds to define what is comprised within the term "trade machinery;" see *ante* § 746.

The limiting words, "for the purposes of this act," are important. Independently of the act fixed trade machinery is not goods and chattels, and, therefore, not within the doctrine of reputed ownership under the bankruptcy act.

§ 752. By the 6th section, "*Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this act, of any personal chattels which may be seized or taken under such power of distress.*"

6th section.

Certain instruments giving powers of distress to be subject to this act.

"*Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.*"

An attornment clause was not uncommonly inserted in mortgage

(a) See Williams on Bankruptcy, p. upon the act of 1878 have been inserted. 123, (ed. 1876.) The alterations following

deeds, and it was until lately generally supposed that a mortgagee might avail himself of such a clause without incurring the responsibilities of a mortgagee in possession. But from recent decisions (b) it appears that under an attornment clause the mortgagee is under the same liability to account as a mortgagee in possession would have been.

§ 753. In *Ex parte Williams*, (c) decided before 1879, a mortgage was made of certain smelting works to secure a debt of £55,000 and interest. The deed contained a clause whereby the mortgagors attorned tenants to the mortgagees at the yearly rent of £20,000. The mortgagors became bankrupt, and the mortgagees claimed under the attornment clause to distrain for a year's rent upon the goods and chattels on the mortgaged premises. It was admitted that the annual value of the property was only £3000. The Court of Appeal held, that the clause was a mere device for obtaining a security over chattels which would otherwise have been divisible among the general body of creditors, and void as an attempt to evade the bankruptcy laws.

But where the rent fixed is a real and not a fictitious one, the chief test of which lies in a comparison of its amount with the fair letting value of the property, a *bona fide* tenancy is created, and the mortgagee is then entitled to exercise all the rights of a landlord, including the right to distrain. (d)

§ 754. These cases arose under deeds executed before the act of 1878, and were decided under the 34th section of the bankruptcy act, 1869, which empowers a landlord to distrain for one year's rent accrued due prior to the date of the order of adjudication. In the case of *Re Stockton Iron Co.*, it was held that the clause was not a "license or authority to take possession of chattels" within the bills of sale act, 1854. But now, under this section, every mortgage deed containing an attornment clause must be registered, in order to render that clause valid as against the trustee in bankruptcy or the execution creditor. (e)

(b) In *re Stockton Iron Furnace Co.*, 335, C. A.; *Ex parte Jackson*, 14 Ch. D. 10 Ch. D. 335, C. A.; per James, L. J., 725, C. A.; and see *Ex parte Punnett*, 16 p. 356; per Bramwell, L. J., p. 357; *Ex parte Isherwood*, 16 Ch. D. 226, C. A.; per Jessel, M. R., p. 235.

(c) 7 Ch. D. 138, C. A.

(e) Per Baggallay, L. J., in *Ex parte Jackson*, 14 Ch. D., at p. 733; Robson on

(d) In *re Stockton Iron Co.*, 10 Ch. D. Bankruptcy 543, (ed. 1881.)

In *Ex parte Harrison*, (*f*) it was held, by the Court of Appeal, that the proceeds of distress for rent levied under an attachment clause are, in the absence of any provision in the deed to the contrary, applicable to payment of principal as well as of interest.

*Ex parte
Harrison.*

§ 755. By the 8th section, "Every bill of sale to which this act applies shall be *duly attested*, and shall be registered under this act within *seven* days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of *filing the petition for bankruptcy or liquidation*, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be.)"

8th section.

Avoidance of
unregistered
bill of sale in
certain cases.

The 15th section of the act of 1882 repeals this section. The 8th section of the same act is a substantial re-enactment of it, but contains this further important provision, that bills of sale to which the act applies will, on failure to comply with the requisites as to attestation, registration, and statement of consideration, be rendered absolutely void. The extent and effect of this repeal is noticed *post* § 774.

Act of 1882.

Under the act of 1854 attestation was unnecessary. *Attestation.*

As to the mode of attestation required by the act of 1878, see *post* § 765

(*f*) 18 Ch. D. 127, C. A., where *Hampson v. Fellows*, 6 Eq. 575, was not followed.

§ 756. There are four classes of persons as against whom an unregistered bill of sale is by this section declared to be void—

Persons as against whom unregistered bill of sale void.

- 1st. The grantor's trustee in bankruptcy or insolvency;
- 2d. His assignees in any assignment for the benefit of creditors;
- 3d. Sheriff's officers and others seizing under execution; and
- 4th. All persons in whose behalf process of execution has issued.

The liquidator of a company is not comprehended in these provisions as being an assignee in bankruptcy or insolvency, (g) because he acts not only for creditors but for contributors and for the company.

Liquidator of a company not an assignee in bankruptcy.

The rule in bankruptcy contained in this section is not applicable under the 10th section of the judicature act, 1875, to the case of the administration by the court of an insolvent's estate. (h) The principle of the decisions is that the 10th section of the judicature act, whilst introducing new rules for the administration of assets, does not enlarge or diminish the assets to be administered.

The new provision as to setting forth the consideration for the bill of sale has already given occasion for numerous decisions which are not all reconcilable, and some of the earlier of which do not seem now to retain much authority.

The case, decided on this point are now referred to in order of date.

§ 757. In *Ex parte Carter*, (i) where the bill of sale recited in effect that £400, the amount of the consideration, had been advanced to the grantor, whereas in fact £240 was advanced to the grantor and his partner jointly, and the dates of the several advances were also misrecited, it was held by the chief judge that, although the transaction was an honest one, the consideration was not truly stated, and the bill of sale void.

Ex parte Carter.

In *Hamlyn v. Betteley*, (k) where the statement of the consideration was "the sum of £182 3s. now paid by the grantee to the grantor," and that sum was paid at the grantor's request, partly to pay out executions on the grantor's goods, partly to

Hamlyn v. Betteley.

(g) *Re Marine Mansions Co.*, 4 Eq. 601.

(h) *Re Knott*, 7 Ch. D. 549, note; *Re D'Epineuil*, 20 Ch. D. 217. See, also, per James, L. J., in *Re Withernsea Brick Works Co.*, 16 Ch. D. 337, C. A., at p. 341, where he points out the limitation to

be put upon the 10th section of the judicature act.

(i) 12 Ch. D. 908. The decision is questioned by Baggallay, L. J., in *Ex parte National Mercantile Bank*, 15 Ch. D., at p. 55.

(k) 5 C. P. D. 327.

the attesting solicitor for money lent and costs due to him from the grantor, and the balance in cash to the grantor, it was held that the statement of the consideration was sufficient in the absence of any suggestion of fraud.

In *Ex parte National Mercantile Bank*, (l) it was held, by the Court of Appeal, that a collateral agreement between the grantor and the grantee as to the application of the consideration does not require to be stated.

Ex parte National Mercantile Bank.

§ 758. In *Ex parte Charing Cross Advance and Deposit Bank*, (m) the consideration was stated in the operative part of the bill of sale as £120. In fact, £90 was paid to the grantor, £30 being retained by the grantee for interest and expenses. At the foot and after the attestation clause there was a receipt setting forth the actual facts. It was held, that the receipt was not part of the deed, and that the consideration was not truly set forth therein. *Ex parte National Mercantile Bank* was distinguished upon the ground that in that case there was a *bona fide* debt existing, independently of and previous to the transaction of loan.

Ex parte Charing Cross Bank.

In *Carrard v. Meek*, (n) the bill of sale was expressed to be "in consideration of the payment of £81 18s. by the grantee to the grantor, and in further consideration of £16 3s. by the grantee to the sheriff of Surrey for and at the request of the grantor." The former sum was a past payment and the latter a present payment to discharge an execution. Held, that the consideration was sufficiently set forth.

Carrard v. Meek.

§ 759. In *Ex parte Berwick*, (o) the consideration for a bill of sale dated the 4th of June, 1879, was stated to be the "sum of £65 now paid" by the grantee to the grantor. The £65 was in fact advanced by installments, the first of which was on the 16th of April, 1877, and the last on the 16th of October, 1878. It was held by the chief judge in bankruptcy that the consideration was not truly stated.

Ex parte Berwick.

In *Ex parte Challinor*, (p) it was held that the bill of sale was not vitiated because a part of the sum stated as the consideration was retained by the grantee to pay the costs of the

Ex parte Challinor.

(l) 15 Ch. D. 42, C. A.

(m) 16 Ch. D. 35, C. A.

(n) 50 L. J., Q. B. 187; 29 W. R. 244.

(o) 43 L. T. (N.S.) 576; 29 W. R. 292, *sed quære*.

(p) 16 Ch. D. 260, C. A. But see *Ex parte Firth*, *infra*.

solicitor in the preparation of the deed and of the auctioneer for the valuation of the property. *Ex parte* Charing Cross Bank was distinguished upon the ground that there a sum was colorably retained for interest when no interest could have been due at the time.

But in *Hamilton v. Chaine*, (q) where there was a deduction for commission upon the loan, and the statement of the consideration was the whole amount of the loan without deducting the commission, the Court of Appeal held that the consideration was not truly stated, and *Ex parte* National Mercantile Bank and *Ex parte* Challinor were distinguished; at the same time Brett and Cotton, L. JJ., expressed doubt as to the correctness of those decisions.

§ 760. In the *Credit Company v. Pott* (r) it was held that the consideration for a bill of sale had been truly set forth, where
Credit Co. v. Pott. upon a statement of accounts it was found that the grantor was indebted to the grantee to the amount of £7350, and the bill of sale recited that the grantee had *agreed to lend* £7350 to the grantor, and the consideration was stated to be £7350 *then* paid by the grantee to the grantor.

In *Ex parte* Winter, (s) the bill of sale recited that the mortgagor was indebted to the mortgagee in the sum of £1444 14s. 3d., and that the mortgagor had agreed to execute the mortgage deed in order to induce the mortgagee not to institute proceedings. The facts were that a few days previous to the execution of the bill of sale the mortgagee had given the mortgagor a cheque for the full amount, but on hearing rumors as to the mortgagor's insolvency, stopped payment of it at the bank. Two days later the stop was withdrawn on the distinct understanding that good security should be given, and the cheque was accordingly paid a few hours prior to the execution of the bill of sale, but no proceedings had been threatened by the mortgagee. Held, that the consideration was properly set forth.

Jessel, M. R., said: "I wish to add that a small inaccuracy in the statement of the consideration will not be sufficient to avoid a bill of sale, otherwise valid. That act was never intended to defraud creditors. Substantial accuracy is sufficient to satisfy its requirements."

(q) 7 Q. B. D. 319, C. A., affirming 8. (s) 44 L. T. (N. S.) 323, C. A., aff. 8.
 C., Id. 1. C., reported *sub nom.* *Ex parte* Ord, 43 L.
 (r) 6 Q. B. D. 295, C. A., aff. 8. C., 42 T. (N. S.) 637.
 L. T. (N. S.) 592.

§ 761. In *Ex parte Rolph*, (t) where out of an ostensible consideration of £50 the sum of £25 had been retained by the grantee under an agreement with the grantor to apply it in payment of the *future* rent of the grantor's house, the agreement being made with a view to better the grantee's security, the Court of Appeal held that the consideration was not truly stated, and *Ex parte National Mercantile Bank* and *Ex parte Challinor* were explained and distinguished.

Finally, in *Ex parte Firth*, (u) the same court held that the consideration was not truly stated when a small sum was retained by the grantee for the expenses attending the attestation of the deed, on the principle that the costs were not an *actual debt* of the borrower, until after the transaction was completed. The result is, that the earlier decisions of the court in *Ex parte National Mercantile Bank* and *Ex parte Challinor* are only binding authorities for the future in cases which come within the principle laid down in *Ex parte Firth*, and which was enunciated by James, L. J., in *Ex parte Challinor* (x) as forming the ground of those decisions. (y)

§ 762. The following rules may be extracted from the foregoing decisions :

1. The first question to determine in every case is, whether the consideration stated in the bill of sale is in substance and in truth the consideration received by the grantor, or whether the statement is a merely colorable one, rendering the bill of sale void as a sham transaction, and a small inaccuracy will not be sufficient to avoid a bill of sale otherwise valid. (z)

2. In the absence of fraud it is not essential that the consideration stated to be paid should pass from the grantee to the grantor at the time of the execution of the bill of sale. The grantee may retain the whole or deduct a part of the amount stated in satisfaction of a pre-existing debt due to himself from the grantor, (a) or may apply it,

(t) 19 Ch. D. 98, C. A.

(u) 19 Ch. D. 419, C. A. Another decision, only reported while this work was passing through the press, is *Ex parte Popplewell*, 21 Ch. D. 73, C. A.

(x) 16 Ch. D., at p. 266.

(y) See per Brett, L. J., in *Ex parte Firth*, 19 Ch. D., at p. 430, and per Jessel, M. R., at p. 428.

(s) *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A.; *Ex parte Charing Cross Bank*, 16 Ch. D. 35, C. A.; *Ex parte Challinor*, Id. 260, C. A.; *Ex parte Winter*, 44 L. T. (N. S.) 323, C. A.; and see *Collis v. Tuson*, 46 L. T. (N. S.) 387.

(a) *Credit Co. v. Pott*, 6 Q. B. D. 295; *Carrard v. Meek*, 50 L. J., Q. B. 187.

with the consent and by the direction of the grantor, in discharge of debts actually due from the grantor to third persons. (b)

3. A collateral agreement as to the application of the consideration does not require to be set out in the bill of sale. (c)

4. The retention of a part of the consideration stated to meet debts of the grantor to accrue due after the date of the execution of the bill of sale, either to third persons or to the grantee, as interest on his loan, will invalidate the bill of sale. (d)

5. The expenses incurred in the preparation of the bill of sale, not being a debt actually due from the grantor at the time of the execution of the bill of sale, the grantee is not entitled to deduct them from the amount of the consideration stated to be paid. (e)

§ 763. By the 9th section, "*Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognizance of the case that the subsequent bill of sale was bona fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this act.*"

Under the earlier act the practice extensively prevailed of executing successive bills of sale, each within the twenty-one days then allowed for registration, the effect being that the security remained valid, and at the same time the bill of sale was kept off the register. The object of the section is to check this practice. (f)

(b) *Hamlyn v. Betteley*, 5 C. P. D. 327; Ch. D. 35, C. A.; *Ex parte Rolph*, 19 Ch. Carrard v. Meek, *ubi supra*; *Ex parte*

Firth, 19 Ch. D. 419, C. A.; *Ex parte* Berwick, 43 L. T. (N. S.) 576; 29 W. R. 292, seems to be inconsistent with these decisions.

(c) *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A., but *quære*, as to the authority now of this decision.

(d) *Ex parte Charing Cross Bank*, 16

(e) *Ex parte Firth*, *ubi supra*, practically overruling on this point *Ex parte Challinor*, 16 Ch. D. 260, C. A.

(f) See the law as laid down in *Smale v. Burr*, L. R., 8 C. P. 64, and confirmed by the Ex. Ch. in *Ramsden v. Lupton*, L. R., 9 Q. B. 17.

9th section.

Avoidance of certain duplicate bills of sale.

In bankruptcy these contrivances had been held invalid as a fraud on the bankruptcy laws. (g)

This section does not affect a subsequent bill of sale executed after the expiration of the seven days. (h)

§ 764. By the 10th section, "A bill of sale shall be attested and registered under this act in the following manner :

- (1.) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor.* (i) 10th section.
Mode of registering bills of sale.
- (2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued,) and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filled."

Under the act of 1854 attestation was unnecessary.

Attestation.

§ 765. The 8th section of this act provides that the bill of sale shall be "duly attested," and the 10th section (subsect. 1) explains due attestation to be an attestation by a solicitor of the Supreme Court; and (subsect. 2) contains the requisites for valid registration, and provides that the bill of sale, and a copy together with an affidavit of the "due execution and attestation" of the bill of sale, shall be filed.

Sect. 8.

Sect. 10, subs. 2.

Subs. 2.

(g) *Ex parte Stevens*, 20 Eq. 786; 187; 29 W. R. 244.

Ex parte Furber, 6 Ch. D. 181.

(i) Repealed by the 10th section of the

(h) *Carrard v. Meek*, 50 L. J., Q. B. act of 1882.

It was decided under this act that want of attestation did not render the bill of sale void as between grantor and grantee; (*j*) but the 8th section of the act of 1882 now renders all bills of sale to which the act applies absolutely void (*post* § 775.)

Under the act of 1878 it had been held that the solicitor acting for both parties was a competent attesting witness, (*k*) and so was the solicitor acting for the grantee; (*l*) but that the grantee himself, although a solicitor, could not be the attesting witness. (*m*)

As to the explanation, it had been decided that though the attestation clause must state that the bill of sale had been explained to the grantor by the attesting solicitor, yet no such explanation need in fact have been given, and its omission would not invalidate the bill of sale. (*n*)

The effect of these decisions was to render the provisions of the 1st subsection practically valueless, and it is now formally repealed by the 10th section of the act of 1882.

The affidavit of "due execution and attestation," filed with the bill of sale, must state that the bill of sale was duly attested, i. e., that the attesting witness was present and witnessed its execution. A mere verification of the signature of the witness to the attestation clause is defective and will invalidate the registration. (*o*) These decisions are still of importance with regard to all bills of sale registered before the 1st of November, 1882, and possibly with regard to absolute bills of sale (to which the new act does not apply) registered after that date.

§ 766. With respect to the description of the residence and occupation of the grantor, the decisions under the statutes have established that the object of the forms and requisites prescribed was to afford to creditors and parties interested a true idea of the position in life of the grantor, and to give such a description of the residence and occupation of the grantor and witnesses

- (*j*) *Davis v. Goodman*, 5 C. P. D. 128, v. *Reed*, 9 M. & W. 404. C. A., overruling S. C., Id. 20. (*n*) *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A.; and see *Hill v. Kirkwood*, 28 W. R. 358, C. A.
- (*k*) *Vernon v. Cooke*, 49 L. J., C. P. 767. (*o*) *Sharpe v. Birch*, 8 Q. B. D. 111; 137. *Ex parte Knightley*, 46 L. T. (N. S.) 776; *Ford v. Kettle*, 9 Q. B. D. 139, C. A.
- (*m*) *Seal v. Claridge*, 7 Q. B. D. 516, C. A., following upon this point *Freshfield*

as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the *bona fides* of the transaction. (*p*)

Any misdescription or non-description in these particulars will therefore vitiate the bill of sale.

Among the very numerous cases which have been decided on this point the following are selected as fair examples:—

It has been held insufficient to describe as “gentleman” only a clerk in the audit office, (*q*) or an attorney’s clerk, (*r*) or a silk buyer. (*s*)

But such a description was held sufficient where the party had no occupation. (*t*)

§ 767. How far the bill of sale may be read together with the affidavit in order to supply omissions or deficiencies in the latter is a question not free from difficulty.

As a general rule the description of the grantor’s residence and occupation should be repeated in the affidavit.

In *Hatton v. English*, (*u*) the bill of sale gave a complete description of the residence and occupation of the grantor, but the affidavit contained no description of his occupation and no reference (apparently) to the description given in the bill of sale; held that it was necessary that the description should be filed along with the bill of sale, and that the fact that the bill of sale contained it was not a compliance with the statute.

In *Pickard v. Bretts*, (*x*) the affidavit described the grantor as “the said J. B., of No. 9, George street, in the said bill of sale mentioned,” but omitted his occupation of hotel-keeper.

(*p*) *Per Wightman, J.*, in *Hewer v. Cox*, 3 E. & E., at p. 483; *per Blackburn, J.*, *Id.*, p. 436; *per eundem* in *Briggs v. Boss*, L. R., 3 Q. B. 268–270; *per eundem* in *Larchin v. North Western Deposit Bank*, L. R., 10 Ex. 64; *per Coleridge, C. J.*, in *Murray v. Mackenzie*, L. R., 10 C. P., at p. 628; *per Cockburn, C. J.*, in *Jones v. Harris*, L. R., 7 Q. B., at p. 160.

(*q*) *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249.

(*r*) *Tuton v. Sanoner*, 3 H. & N. 280; 27 L. J., Ex. 293; *Beales v. Tennent*, 29 L. J., Q. B. 188.

(*s*) *Adams v. Graham*, 33 L. J., Q. B. 71.

(*t*) *Morewood v. South Yorkshire Railway Co.*, 3 H. & N. 798; 28 L. J., Ex. 114; *Sutton v. Bath*, 3 H. & N. 382; 27 L. J., Ex. 388; *Nicholson v. Cooper*, 3 H. & N. 384; *London Loan Co. v. Chace*, 12 C. B. (N. S.) 730; 31 L. J., C. P. 314; *Grant v. Shaw*, L. R., 7 Q. B. 700; *Brodrick v. Scalé*, L. R., 6 C. P. 98; *Smith v. Cheese*, 1 C. P. D. 60; *Castle v. Downton*, 5 C. P. D. 56; *Ex parte Wolfe*, 44 L. T. (N. S.) 321; affirmed, *sub nom. Ex parte Chapman*, 45 L. T. (N. S.) 265, C. A.

(*u*) 7 E. & B. 94; 26 L. J., Q. B. 161.

(*x*) 5 H. & N. 9; 29 L. J., Ex. 18.

Description of grantor and witnesses.

Description of occupation.

How far bill of sale and affidavit may be read together.

Hatton v. English.

Pickard v. Bretts.

The bill of sale accurately described his residence and occupation, but there was nothing in the affidavit which *verified* the description given in the bill of sale; held that the bill of sale could not be referred to in order to supply the want of any description of his occupation in the affidavit.

But in *Jones v. Harris*, (y) where the residence was incompletely *Jones v. Harris*. but accurately stated in the affidavit as "Dynevor Lodge," and was completely stated in the bill of sale as "Dynevor Lodge in the parish of Llanarthney, in the county of Caermarthen," it was held that the ambiguity arising from the incompleteness of the affidavit might be cured by reference to the bill of sale.

The question of sufficiency is always one of degree, and as was said by Blackburn, J., in *Jones v. Harris*, (z) "Chatsworth" would be a sufficient description of the residence of the Duke of Devonshire, and possibly "Scotland" of the Duke of Buccleuch.

The general rule, therefore, seems to be modified to this extent that it is allowable by a reference to the bill of sale to supplement the description given, but not to supply a description omitted, in the affidavit.

A variance, however, between the description given in the bill of sale and that given in the affidavit is fatal. (a)

§ 768. The residence of the witness has been held sufficiently indicated by giving his place of business, without describing the place where he sleeps, (b) or conversely by giving his private abode without his place of business. (c)

A residence described as "New street, Blackfriars, in the county of Middlesex," without adding the "city of London," was held sufficient, (d) and so was a residence described as "in the county of Chester," *Briggs v. Boss*. which was in fact situate within the county of the city of Chester. (e) And in *Briggs v. Boss*, (f) the attesting witness stated: "I reside at Hanley, in the county of Stafford, and am an accountant,"

(y) L. R., 7 Q. B. 157.

(z) L. R., 7 Q. B., at p. 164.

(a) *Murray v. Mackenzie*, L. R., 10 C. P. 625.

(b) *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J., Ex. 23; *Blackwell v. England*, 8 E. & B. 56; 27 L. J., Q. B. 124.

(c) *Yardley v. Jones*, 4 Dowling P. C. 467.

(d) *Hewer v. Cox*, 3 E. & E. 428; 30 L. J., Q. B. 78.

(e) *Ex parte M'Hattie*, 10 Ch. D. 398, C. A.

(f) L. R., 3 Q. B. 268; 37 L. J., Q. B. 101. See, also, *Blackwell v. England*, 8 E. & B. 541; 27 L. J., Q. B. 124; *Re Hams*, 10 Ir. Ch. R. 100; 1 L. T. (N. S.)

and this was held sufficient both as to residence and occupation, although it was proven that Hanley was a borough containing 40,000 inhabitants, and although the deponent was a clerk of an accountant residing in Manchester, whose name was over the door of the place of business in Hanley; these facts being overcome by proof, first, that hundreds of letters reached the deponent addressed Hanley only: and, secondly, that although he was only a clerk at Hanley for the Manchester accountant, he was allowed by his employer to do business occasionally on his own account: but in a later case before the Queen's Bench the same description "accountant" was held to be an insufficient description of the occupation of a clerk in the accountant's department at Euston Station, although he worked for other people after office hours, in bookkeeping and matters of account, and the court characterized *Briggs v. Boss* as an extreme decision. (g)

Larchin v. North Western Deposit Bank.

An affidavit describing the grantor's residence and occupation to the "best of the belief" of the witness, was held sufficient by the Exchequer of Pleas, in *Roe v. Bradshaw*. (h)

Affidavit to "best of belief."

§ 769. In *Shears v. Jacobs*, (i) it was held that a trading company is competent to give a bill of sale, and that an affidavit describing the company as "The Glucose Sugar and Coloring Company," and giving the address of its principal office, was a sufficient compliance with the act.

Trading company may give bill of sale.

It was further held in this case and in *Deffell v. White*, (k) that directors attesting the seal of the company were not witnesses within the meaning of the act whose residences it is necessary to state.

Directors attesting seal not witnesses under the act.

The description of the residence and occupation of the grantor required is the description of such residence and occupation at the date of the affidavit, and not at the time of making or giving the bill of sale. (l)

There is nothing in the act which necessitates the name of the grantor being correctly given, so far as regards the validity of the registration. It is sufficient if he can be identified from the name,

(g) *Larchin v. North Western Deposit Bank*, L. R., 10 Ex. 64.

(h) L. R., 1 Ex. 106; 35 L. J., Ex. 71.

(i) L. R., 1 C. P. 513; 35 L. J., C. P. 241.

(k) L. R., 2 C. P. 144.

(l) *Button v. O'Neill*, 4 C. P. D. 354, C. A., dissenting from *London and Westminster Loan Co. v. Chase*, 12 C. B. (N. S.) 730; but see *Ex parte Kahen*, 46 L. T. (N. S.) 356.

residence and occupation given, and an error in the Christian name is of no importance. (*m*)

§ 770. In *Marples v. Hartley*, (*n*) decided under the act of 1854, the facts were that a bill of sale was given on the 27th of June, and a creditor's execution levied on the 5th of July, within the twenty-one days then allowed for registration. The grantee did not register at all. Held that his title under the bill of sale was good: the court declaring that "two things are required before the requirements of the statute need be complied with: the apparent possession of the goods and the lapse of the twenty-one days. The assignee has the period of twenty-one days within which he may complete his title by registering the bill of sale: but if he takes possession under it in the meantime, he need not register at all. Here, it was not invalidated at the time the goods were received by the sheriff. It therefore gave the claimant a good title to the goods till he had so seized them or had registered it within the twenty-one days."

The principle of this decision would now apply under the acts of 1878 and 1882, substituting seven for twenty-one days.

§ 771. By the 10th section (subs. 3): "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this act therewith and as part thereof, otherwise the registration shall be void."

This provision is substantially the same as that contained in the 2d section of the act of 1854.

In *Robinson v. Collingwood*, (*o*) it was held under the act of 1854 that the section applied only to declarations of trust between the grantor and the grantee, not to one between the grantee and a stranger to the grantor.

In *Ex parte Southam*, (*p*) it was held that a prior parol agree-

(*m*) *Ex parte M'Hattie*, 10 Ch. D. 398, C. A.

(*n*) 1 B. & S. 1; 30 L. J., Q. B. 92; see, also, *Banbury v. White*, 2 H. & C. 300; 31 L. J., Ex. 258; and *Ex parte Kahen*, *supra*.

(*o*) 17 C. B. (N. S.) 777; 34 L. J., C. P. 18.

(*p*) 17 Eq. 578. See, also, *Ex parte Collins*, 10 Ch. 367; *Ex parte Odell*, 10 Ch. D. 76, C. A.; *Ex parte Popplewell*, 21 Ch. D. 73, C. A.

ment not appearing in the bill of sale, by which the debt was to be paid off by small weekly installments, amounted to a defeasance or condition within the meaning of the section, and must be registered.

Defeasance or condition.

§ 772. Further, by the 10th section, "*In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels,*" and "a transfer or assignment of a registered bill of sale need not be registered."

10th section.

Priority given by date of registration.

It has now been decided by the Court of Appeal in *Connelly v. Steer* (g) in opposition to *Lyons v. Tucker*, (r) that priority is given by registration whether or not bankruptcy or execution has supervened. In other words, this clause must be read not with, but independently of, the 8th section. The effect, therefore, of the clause is to alter the law as laid down in *Meux v. Jacobs*, (s) and other cases which followed that decision.

Connelly v. Steer.

Whether the holder of a second bill of sale will lose the priority given by registration, if he has had notice of a prior unregistered bill of sale at the time when he advanced his money, according to the doctrine of *Le Neve v. Le Neve*, (t) has not yet been decided.

Priority as affected by notice.

The reader, however, is referred to *Edwards v. Edwards*, (u) where it was held that the fact that an execution creditor was at the time when his debt was contracted aware that his debtor had given a bill of sale, did not prevent his availing himself of the objection that it had not been registered. The principle of that decision, as expressed by James and Mellish L. JJ., is that it would be dangerous to engraft an equitable exception upon a modern act of parliament.

Edwards v. Edwards.

(g) 7 Q. B. D. 520, C. A.

(r) 6 Q. B. D. 660, where all the previous cases are discussed by Lindley, J. After the decision of the Court of Appeal in *Connelly v. Steer*, the case was reversed, 7 Q. B. D. 523, C. A.

(s) L. R., 7 H. L. 481. See, also, *Richards v. James*, L. R., 2 Q. B. 285; *Edwards v. English*, 7 E. & B. 564; *Ex parte Cochrane*, 3 Ch. D. 324; S. C., 4 Ch. D. 23, C. A.; *Ex parte Payne*, 11 Ch. D. 539.

(t) 2 W. & T. L. C. in Eq. 32, (ed. 1877.)

(u) 2 Ch. D. 291, C. A.; *Maxwell on Statutes* 233, (ed. 1875.)

On the other hand, in *Graves v. Tofield*, (x) to the decision in which James, L. J., was a party, an annuity deed not registered under 18 and 19 Vict., c. 15, § 12, was held valid as against all subsequent encumbrancers who took with notice of the annuities. *Edwards v. Edwards* was not cited, but the principle of the decision in *Graves v. Tofield* was that the wording of the section was similar to that employed in the old registry acts, under which notice had been held fatal to the subsequent registered encumbrancers, and that therefore the legislature must be taken to have used the words in the later act in the sense given to them by the decisions under the earlier acts, otherwise they would have used the words "any notice notwithstanding," which appear in some of the other sections.

It is therefore submitted that notice of the existence of a prior unregistered bill of sale would not, under this section, prejudice the title of a second bill of sale holder who had duly registered.

As to a transfer of a registered bill of sale, see *Horne v. Hughes*. (y)

§ 773. By the 11th section, "The registration of a bill of sale must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void."

11th section.
Renewal of
registration.

This section is retrospective.

It has been decided that the registration must be renewed within the required period, although in the meantime the bill of sale has been transferred to a third person, and the assignee, if the registration is not renewed, has no title as against an execution creditor. (z)

§ 774. The amendment act of 1882, which is to be construed, so far as is consistent with its tenor, as one with the act of 1878, came into operation on the 1st of November, 1882. The act, except as to the provision contained in the 13th section, is not retrospective. It *applies only to bills of sale given by way of security for the payment of money, i. e.* to bills of sale by way of mortgage (sect. 3), and is not to apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the company's capital, stock or goods, chattels and effects (sect. 17.)

Amendment
act, 1882.

The 10th and 15th sections of the act expressly repeal the 8th and

(z) 14 Ch. D. 563, C. A.
(y) 6 Q. B. D. 676, C. A.

(s) *Karet v. Kosher Meat Supply Association*, 2 Q. B. D. 361.

20th sections and a portion of the 10th section of the act of 1878, as well as any provisions of the earlier act which ^{Repealing sections.} are inconsistent with the later act. It is impossible at the present time to state positively the effect of repealing these sections, and the point will no doubt be soon judicially determined. The 3d section of the act of 1882 enacts that the act shall not apply to bills of sale "given otherwise than by way of security for the payment of money," and if the scope of the act is thus to be limited to conditional bills of sale, the effect may be that the law as to absolute bills of sale remains unchanged, and they continue to be subject to all the provisions of the act of 1878. On the other hand, as the repeal of the sections in question is absolute in terms, the effect would seem to be simply to strike the repealed sections out of the act of 1878, leaving absolute bills of sale—i. e. bills of sale given otherwise than as security for the payment of money—subject to the provisions of the act of 1878 which are left unrepealed by the amendment act. It would then seem to follow that this class of bills of sale no longer requires to have the consideration for which they are given set out, nor, indeed, to be attested or registered, for although the unrepealed portions of the 10th section of the act of 1878 provide for attestation and registration, the penalty attaching to non-compliance with these provisions is removed by the repeal of the 8th section. At the same time, by the repeal of the 20th section, goods comprised in an absolute bill of sale, even though registered, would become subject to the order and disposition clause of the bankruptcy act. The point, however, is by no means clear, and must await judicial decision.

§ 775. The following are the more important provisions contained in the new act:—

I. Every bill of sale to which the act applies is to be ^{Provisions of the act of 1882.} *absolutely void*, unless—

1. Made *in accordance with* the form in the schedule to the act (sect. 9);
2. Duly attested, that is to say, attested by one or more credible witnesses, not being a party or parties thereto (z) (sects. 8 and 10.)
3. Registered under the act of 1878 within seven clear days, if executed in England, or where the execution has taken place

(z) These last words are merely declaratory of the law before the act. See *Claridge*, 7 Q. B. D. 516, C. A.; and see *Freshfield v. Reed*, 9 M. & W. 404.

out of England, within seven clear days after the bill of sale would have reached England in course of post, if posted immediately after its execution (sect. 8.)

4. The consideration, which, as under the act of 1878, must be truly set forth, is at least £30 (sects. 8 and 12.)

§ 776. II. Every bill of sale to which the act applies is to be *void except as against the grantor* in respect of any personal chattels—

1. Comprised in the bill of sale, and not specifically described in a schedule annexed thereto (sect. 4);
2. Specifically described in the schedule, but of which the grantor was not the “true owner” at the time of its execution (sect. 5.)

Growing crops actually growing at the time when the bill of sale was executed, and fixtures, plant or trade machinery substituted for any of the like fixtures, plant or machinery specifically described in the schedule, are excepted from the operation of the two foregoing paragraphs (sect. 6.)

The object of these sections is to prevent a person for the future from contracting to assign after-acquired property to the detriment of his creditors. Under the earlier acts, assignments were often made of after-acquired property, and especially of stock in trade, which might at any time during the continuance of the security be upon the debtor's premises, and applying the rule laid down in equity in *Holroyd v. Marshall*, (a) it was held in several cases (b) that such assignments operated so as to give a title to stock in trade acquired after the date of the bill of sale.

§ 777. III. Personal chattels assigned under a bill of sale to which the act applies are only to be liable to seizure by the grantee for one of the five following causes :

1. Default in payment of the sum secured at the due date, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;
2. The bankruptcy of the grantor or his suffering the goods to be distrained for rent, rates or taxes;

(a) 10 H. L. C. 191. As to the way in which equity viewed these contracts to assign, see per Jessel, M. R., in *Collyer v. Isaacs*, 19 Ch. D., at p. 351, C. A. 47 L. J., Q. B. 581; *Lazarus v. Andrade*, 5 C. P. D. 318; but the charge must relate to specified property, *Belding v. Reed*, 3 H. & C. 955; *Re D'Epinuil*, 20 Ch. D. (b) *Leatham v. Amor*, 26 W. R. 739; 758.

3. The grantor's fraudulently removing or suffering the goods to be removed from the premises ;
4. The grantor's failure, without reasonable excuse, to produce, upon the written demand of the grantee, his last receipts for rent, rates, and (c) taxes ;
5. Execution levied on the goods under a judgment.

And even where seizure has taken place for any one of the foregoing causes, the court or a judge may on the application of the grantor, within five days from the seizure, restrain the grantee from removing or selling (d) the goods, if satisfied that, by payment or otherwise, the cause of seizure no longer exists (sect. 7) ; and in order to give time for such an application, the goods seized are not to be removed or sold (d) until the expiration of five clear days from the seizure.

There is nothing in the 7th section to warrant the statement in the marginal note that a bill of sale containing a power to seize, except for one of the five given causes, shall be void. (e)

The insertion in the bill of sale of a cause of seizure not authorized by the act would probably be simply nugatory.

It would seem, also, that no practical effect could be given to the second authorized cause of seizure, where the grantor of the bill of sale is a trader. The 15th section of the act of 1882 repeals the 20th section of the act of 1878, and the result, at any rate so far as relates to conditional bills of sale, is to bring chattels comprised in a bill of sale, even if registered, within the order and disposition clause of the bankruptcy act, 1869 (*ante* § 749.)

§ 778. IV. A bill of sale to which the act applies, is not to be any protection against taxes and poor and other parochial rates (sect. 14.)

Lastly. Provision is made for the local registration in the county courts of abstracts of bills of sale to which the act applies, in addition to the registration in London under the act of 1878 (sect. 11,) and the right to inspect and take extracts from registered bills of sale is defined and limited (sect. 16.)

(c) This should probably be "or."

(d) It is to be observed that although a power of sale is here implied, no express power of sale is given to the grantee either in the form in the schedule to the act or in the body of the act itself. It is submitted, however, that a bill of sale

containing a power of sale would be treated as "in accordance with" the form in the schedule to the act, which is all that is required by the 9th section.

(e) The marginal note correctly summarized the clause as it stood in the draft bill.

§ 779. It is to be observed that neither the statute of Elizabeth nor the earlier bills of sale acts rendered the contract void *between the parties*, (f) and the 8th section of the act of 1878 carefully enumerates those third persons who shall remain unaffected by the contract, where the forms and requisites rendered necessary by the act have not been complied with. Without these provisions, however, it would not be competent to either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors, (g) for the general principle of law that no man shall set up his own fraud as the basis of a right or claim for his own benefit would clearly apply. (h) But even as to creditors, such conveyances are not *void*, but *voidable*, and the creditors must, as in all analogous cases, elect whether they will treat their debtor's conveyance as valid or defeasible. If the transferee makes a conveyance to a *bona fide* third person for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such *bona fide* third person will not be disturbed. (i) But the assignee for value of a bill of sale is not protected as a *bona fide* third person unless he renew the registration within five years, as required by 29 and 30 Vict., c. 96. (k) 63

Old law.
Contract not voidable between the parties.

Voidable, not void as to creditors.

Title of *bona fide* third persons acquired from transferee good against creditors.

(f) *Davis v. Goodman*, 5 C. P. D. 128, C. A., overruling *Div. Cl.*, *Id.* 20.

(g) *Bessey v. Windham*, 6 Q. B. 166; *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367.

(h) *Id. Philpotts v. Philpotts*, 10 C. B. 85; 20 L. J., C. P. 11.

(i) *Moorewood v. South Yorkshire Railway Co.*, 3 H. & N. 799; 28 L. J. Ex. 114.

(k) *Karet v. Kosher Meat Supply Association*, 2 Q. B. D. 361.

63. Transfers in Fraud of Creditors are Valid Between the Parties, and Against all Save Creditors.—*Telford v. Adams*, 6 Watts 429, 434; *Boyle v. Rankin*, 22 Penna. 168, 170; *Phipps v. Boyd*, 54 Penna. 342; *Evans v. Herring*, 27 N. J. L. 243; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Gary v. Jacobson*, 55 Miss. 204; *Maher v. Swift*, 14 Nev. 324; *Allison v. Hogan*, 12 Nev. 38; *Harvey v.*

Varney, 98 Mass. 118; *Brooks v. Martin*, 2 Wall. 70; *Ybarra v. Lorenzana*, 53 Cal. 197; *Mudge v. Oliver*, 1 Allen 74. These cases rest on the ground that the court will not allow either party to call his own act fraudulent. But there are cases which hold that the fact of the fraud may be shown, and the result will be that the party seeking relief upon a contract founded in fraud, will fail. These decisions are founded on the principle expressed by the maxim, *In pari delicto melior est conditio possidentis*. *Church v. Muir*, 33 N. J. L. 318. In this case *Beasley*, C. J., erroneously supposes this view to be sustained by the greater weight of authority. *Nellis v. Clarke*, 20 Wend. 24; S. C., 4 Hill 424. And see *Gary v. Jacobson*, 55 Miss. 204, where the subject is discussed and cases cited. *Burleigh v. White*, 64 Me. 23.

§ 780. The act of 1882 has made an important change in this respect. It repeals the 8th section of the act of 1878, above referred to, and renders any bill of sale given by way of mortgage *absolutely void*, unless it complies with the provisions contained in the 8th, 9th and 12th sections of the act.

New law.

Contract absolutely void in certain cases.

Under the statute of Elizabeth it was held in various cases that as the transfer was good not only between the parties, but as against strangers, not creditors, the sheriff would be held liable as a trespasser if he seized the goods on execution against the vendor, unless he put in evidence the writ to show that he was acting for a creditor; (l) and in *White v. Morris*, (l) it was held, overruling *Bessey v. Windham*, (m) that it was necessary for the sheriff to produce, in evidence, the judgment as well as the writ, in order to defend himself in such cases.

Sheriff liable as trespasser unless he show both judgment and writ.

White v. Morris.

Bessey v. Windham.

A bill of sale being a security for a debt becomes void when the debtor has been released by a discharge in bankruptcy. (n)]

Discharge in bankruptcy avoids bill of sale.

SECT. VI.—FRAUD ON CREDITORS—FRAUDULENT PREFERENCE.

§ 781. Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles on which the bankrupt and insolvent laws of the country are based, the object of these laws being to secure an equal ratable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *puri passu*; and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share. (o) 64

Sale for purpose of disturbing equality among creditors.

(l) *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367; *Bessey v. Windham*, 6 Q. B. 166; *Glave v. Wentworth*, 6 Q. B. 173, n.

(l) 11 C. B. 1015, and 21 L. J., C. P. 185.

(m) See note (l), *ante* § 780.

(n) *Thompson v. Cohen*, L. R., 7 Q. B. 527; *Cole v. Kernott*, Id. 534; and see *Collyer v. Isaacs*, 19 Ch. D. 342, C. A.

(o) *Daughlish v. Tennent*, L. R., 2 Q. B. 49; 36 L. J., Q. B. 10; *Howden v. Haigh*,

64. Sales in Violation of the Insolvent Laws, or Bankruptcy Act.—See *ante* note 59. Although some of the

various assignment laws of the states render preferences void, yet as interpreted, this means, in effect, only that a prefer-

§ 782. In this connection it may be useful to refer to a class of cases which will again come under consideration in the chapter treating of *stoppage in transitu*. The equity in favor of returning goods to an unpaid vendor by a buyer who finds that he is insolvent, and will be unable to pay for them, is so strong in its appeal to the conscience of honest men, that cases have frequently arisen where the buyer, on becoming insolvent, has attempted to prevent the goods from being fused into the common mass of assets by rejecting them, or rescinding the sale, and returning the goods.

Return of
goods to un-
paid vendor by
an insolvent.

§ 783. In some early cases, before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy. The earliest case on the subject was *Atkin v. Barwick*, (*p*) variously reported, and of which a full account was given by Lord Abinger in his dissenting opinion in *James v. Griffin*. (*q*) But although this case subsequently

Early cases
sanctioned
rescission of
sales after
delivery to
buyer, if be-
fore an act of
bankruptcy.

11 Ad. & E. 1033; *Higgins v. Pitts*, 4 Ex. 312; *Wilson v. Ray*, 10 Ad. & E. 82; *Leicester v. Rose*, 4 East 371; *Mallalieu v. Hodgson*, 16 Q. B. 689; 20 L. J., Q. B. 339; *Britten v. Hughes*, 5 Bing. 460; *Coleman v. Waller*, 3 Y. & J. 212; *Wells v. Girling*, 1 B. & B. 447; *Elliott v. Rich-*

ardson, L. R., 5 C. P. 744. See, also, *Jackson v. Duchaise*, 3 T. R. 551, and *Nunes v. Carter*, L. R. 1 P. C. 342, for an instructive opinion of Lord Westbury, on the construction of statutes setting aside sales made in contemplation of bankruptcy.

ence in the assignment itself, or a preference given where both seller and buyer contemplate that an assignment will be speedily made, will be void. And the interpretation of the late United States bankruptcy law was similar. The following are recent cases upon the general subject: *Jones v. Syer*, 52 Md. 211; *Gardner v. Commercial Bank*, 95 Ill. 298; *Eldridge v. Phillipson*, 58 Miss. 276; *Scott v. Alford*, 53 Tex. 82; *Blennerhassett v. Sherman*, 105 U. S. 100; *Rogers v. Palmer*, 102 U. S. 263; *Barbour v. Priest*, 103 U. S. 293; *Guernsey v. Miller*, 80 N. Y. 181; *Auffmordt v. Rasin*, 102 U. S. 620; *Getman v. Oswego Bank*, 23 Hun 498; *James v. Mechanics' Bank*, 12 R. I. 460; *Van*

Patten v. Burr, 52 Iowa, 518; *Hanselt v. Vilmar*, 76 N. Y. 630; *Grant v. National Bank*, 97 U. S. 80; *Lincoln v. Wilbur*, 125 Mass. 249; *Zahm v. Fry*, 10 Phil. 247; *Frasér v. Thatcher*, 49 Tex. 26; *Dance v. Seaman*, 11 Gratt. 778; *Sipe v. Earman*, 26 Gratt. 563, 566; *Bentz v. Rockey*, 69 Penna. 71, 76; 1 Am. L. Cas. 61, [56]; *Gottwalls v. Mulholland*, 15 U. C. C. P. 62; affirmed, 3 E. & A. 194; *Gordon v. Young*, 12 Grant's Ch. (Ont.) 318; *Risk v. Sherman*, 21 Id. 250; *Frazier v. Fredericks*, 24 N. J. L. 162.

(*p*) 1 Stra. 165; 10 Mod. 432; *Fortes*, 353.

(*q*) 2 M. & W. 623-639.

received countenance in *Alderson v. Temple*, (r) in *Harman v. Fisher*, (s) and various other cases, and was made the basis of the decision in *Salte v. Field*, (t) yet the *ratio decidendi* was constantly questioned, and it is now perfectly well settled that if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraudulent preference in favor of the vendor. This was first distinctly held by Lord Kenyon and the King's Bench, in *Barnes v. Freeland*, (u) almost immediately after the decision given by them in *Salte v. Field*, (t) and the question now always turns upon the point whether—First, the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or secondly, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods.

Overruled in later cases.

Now only permissible if, 1st, the property has not completely passed:

or, 2ndly, possession has not been taken by buyer.

§ 784. An instance of the first kind is given in *Nicholson v. Bower*, (v) where wheat was purchased by sample, and forwarded to the purchaser by railway, and on arrival at the railway warehouse, a bulk-sample was taken to the purchaser by his orders, and found to correspond, but the purchaser, knowing himself to be insolvent, told his carman, "Don't cart it home at present." The sale was by parol, and the impression of the judges evidently was, that the transit was at an end, so that the vendor's right of stoppage was gone: but the value being over £10, the sale was incomplete under the statute of frauds, unless the vendor had *accepted* as well as received the goods, and although it might be his duty to accept when he found that the bulk accorded with the sample according to his verbal agreement, yet if he chose not to accept, the sale was incomplete, and his object of returning the goods to his vendor would thus be accomplished. In the language of Erle, J., in commenting on the buyer's

Nicholson v. Bower.

(r) 4 Burr. 2235.

(s) Cowp. 117.

(t) 5 T. R. 211.

(u) 6 T. R. 80. See, also, *Neate v. Ball*, 2 East 123; *Richardson v. Goss*, 3

B. & P. 119; *Heinecke v. Erle*, in Ex. Ch., 8 E. & B. 410; 28 L. J., Q. B. 79.

(v) E. & E. 172; 28 L. J., Q. B. 97;

and see *Richardson v. Goss*, 3 B. & P. 119; and *Ex parte Cote*, 9 Ch. 27.

action, "The meaning of all this seems to be this:—'I will hold my hand: in honesty the wheat ought to go back as I cannot pay for it;' and he sends the next day a notice to the vendor, and is willing that it should get back to him, if by law it might. The bankrupt broke his contract, mayhap, by not accepting, but that does not show that there *was* an acceptance." (w)

§ 785. But even if the *property* has passed, it may be that the *possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others. The different cases in which buyers have adopted this course and thus kept unimpaired the vendor's right of stoppage *in transitu*, are referred to in the note. (x) ⁶⁵

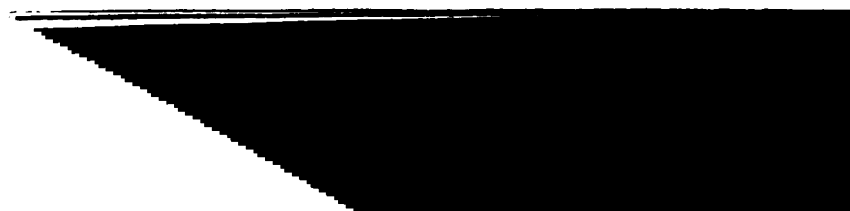
The reader is also referred to a very singular case, that of *Dixon v. Baldwin*, (y) where the King's Bench decided that although the transit was at an end, and although both the property and possession were confessedly in the vendee, yet, under the special circumstances of the case, the buyer had not laid himself open to a charge of fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of his intention to do so, made to his creditors at a meeting called by him, and not done with the voluntary intention of giving an undue advantage. The judges were not unanimous, and the question was considered by the majority rather as one of fact than of law.

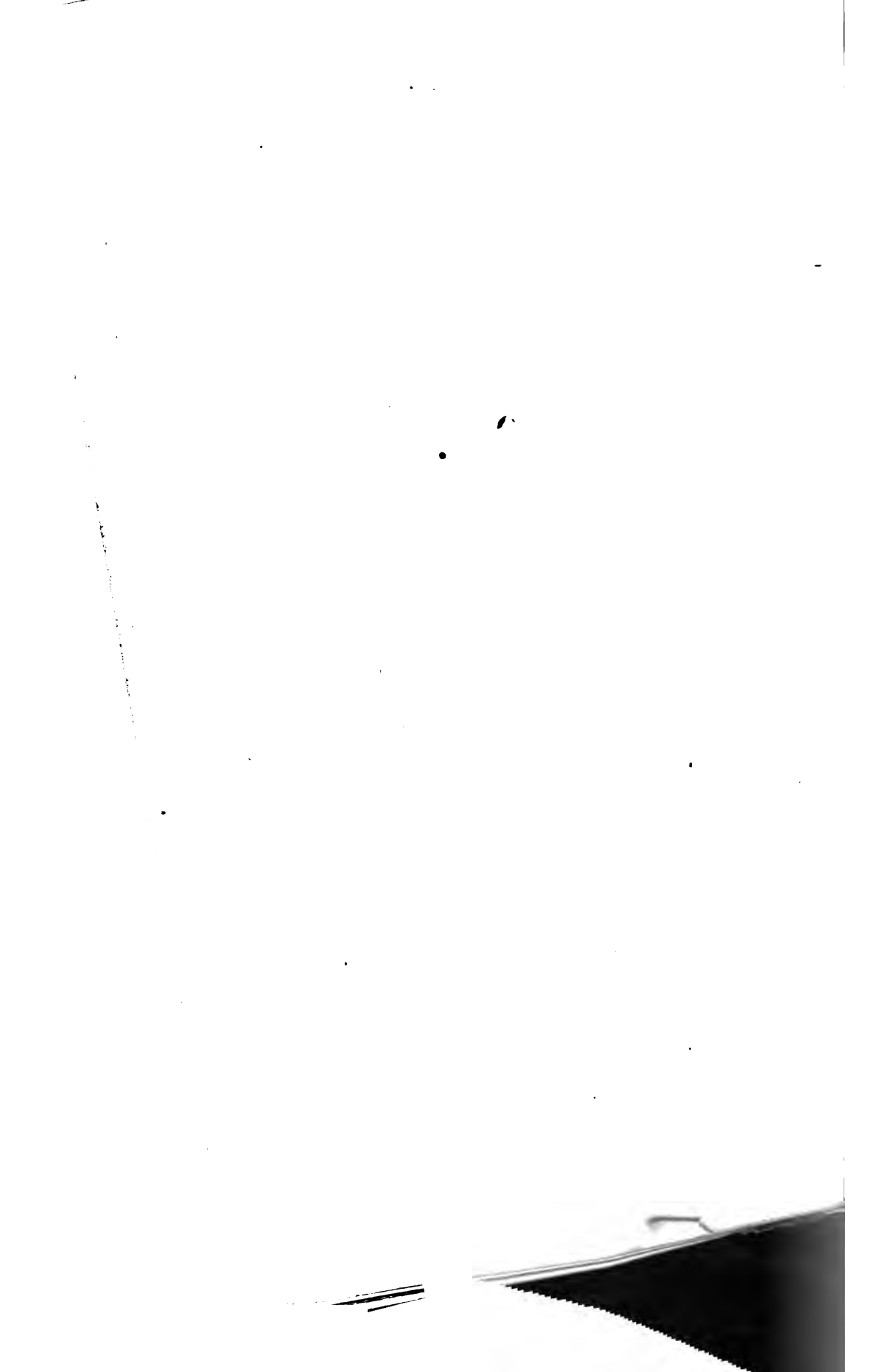
(w) As to what amounts to a rescission of a contract by an insolvent purchaser, see *Morgan v. Bain*, L. R., 10 C. P. 15.

(x) *Atkin v. Barwick*, 1 Str. 165; 10 Mod. 432; *Fortes*, 353; *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; *Smith v. Field*, 5 T. R. 402; *James v. Griffin*, 2 M. & W. 623; *Siffken v. Wray*, 6 East 371; *Heincke v. Erle et al.*, 28 L. J., Q. B. 79, and 8 E. & B. 410; *Bolton v. Lancashire and York Railway Co.*, L. R., 1 C. P. 431; 35 L. J., C. P. 137; *Whitehead v. Anderson*, 9 M. & W., at p. 529. See remarks of *Parke, B.*, in *Van Casteel v. Booker*, 18 L. J., Ex. 9, at p. 14; 2 Ex. 691, at p. 706.

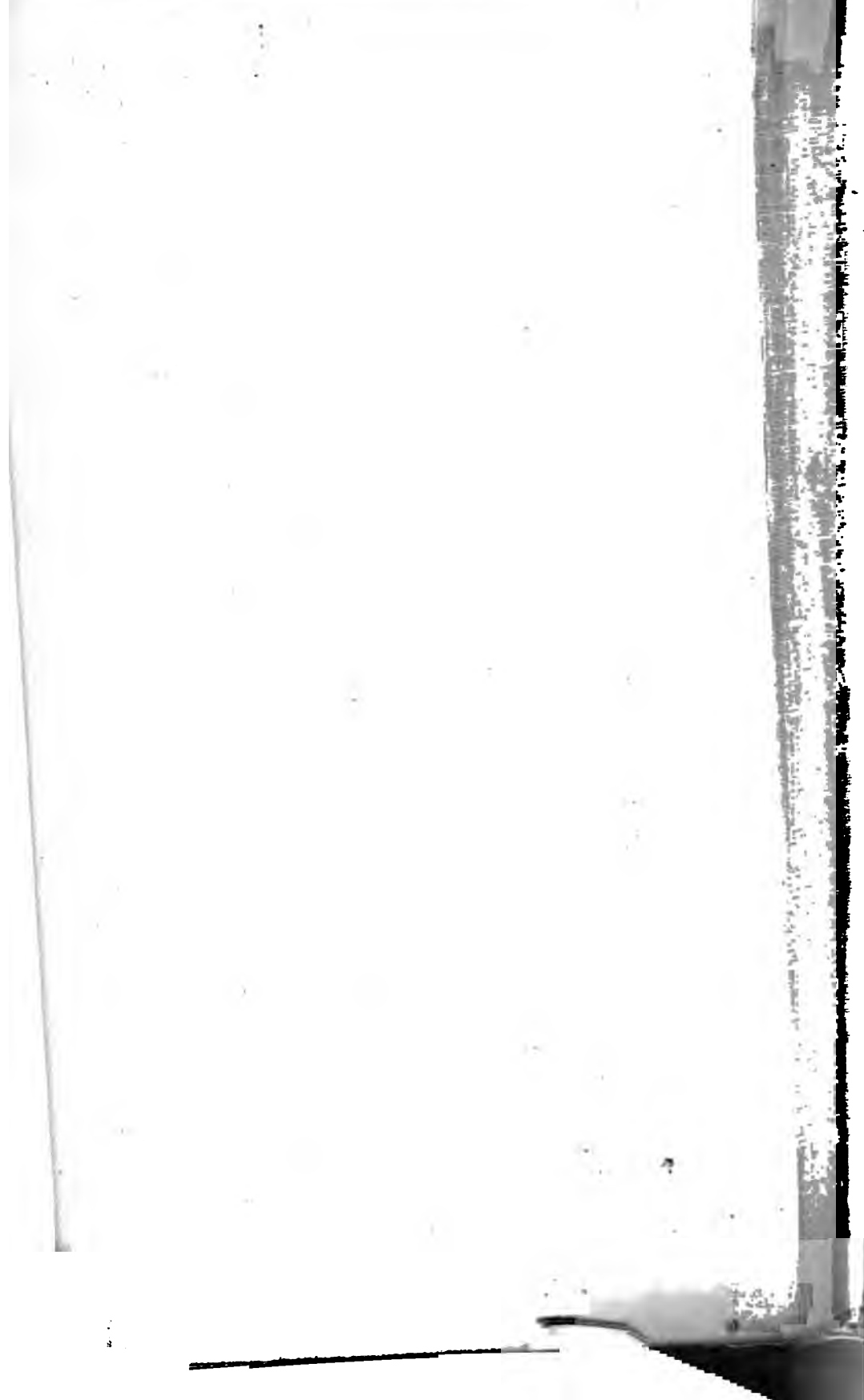
65. Voluntary Avoidance by Insolvent Buyer.—See *v. Lord*, 66 Me. 580, 582; *Clark v. Bartlett*, 50 Wis. 543, 547. In this last case the goods came to the hands of the insolvent buyer, who had rescinded, and he took them into his possession, but only for their safe-keeping and not to hold as owner. It was held that the assignee for the benefit of the buyer's creditors could not take the goods. To the same effect see next case. *Sturtevant v. Orser*, 24 N. Y. 533, 544; *Grout v. Hill*, 4 Gray 361; *Clemson v. Davidson*, 5 Binn. 392; *Greaner v. Mullen*, 15 Penna. 200, 206; *Clark v. Lynch*, 4 Daly 83.

(y) 5 East 175.









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